

# The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes

RAYMOND ROBERT COLETTA\*

The history of nuisance law chronicles a strong reluctance on the part of courts to recognize actions based on aesthetics. While nuisance law has been characterized as “all things to all men,”<sup>1</sup> it has consistently denied redress to individuals claiming injury to their visual sensibilities.<sup>2</sup> Aesthetics, it has been said, is just too subjective a field on which to base an action in nuisance.<sup>3</sup> The tastes and preferences of individuals admit to infinite variations. What is visually offensive to one individual may be visually exhilarating to another. Based on such rationale, courts have denied relief to neighbors complaining of, *inter alia*, accumulated junk,<sup>4</sup> pyramidal shaped houses,<sup>5</sup> unkempt yards,<sup>6</sup> and tennis court lighting.<sup>7</sup> Because of the difficulty of establishing an objective standard of beauty, courts have refused to become “arbiters of taste,”<sup>8</sup> declining the invitation to make property rights dependent on aesthetic sensibilities.

This judicial reluctance to recognize an action in nuisance based on aesthetic considerations is, I will argue, based on a fundamental error. By equating aesthetics

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\* Assistant Professor of Law, University of the Pacific, McGeorge School of Law. J.D. 1981, Boalt Hall School of Law, University of California, Berkeley.

1. When discussing the historical origins of nuisance law, Prosser stated:

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word “nuisance.” It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for analysis of a problem; the defendant’s interference with the plaintiff’s interests is characterized as a “nuisance,” and there is nothing more to be said.

W. PROSSER & P. KEETON, *THE LAW OF TORTS* § 86, at 616 (5th ed. 1984).

2. See 58 Am. Jur. 2d *Nuisances* § 44 (1971).

3. In *Parkersburg Builders Material Co. v. Barrack*, 118 W. Va. 608, 192 S.E. 291 (1937) (Kenna, J., concurring), Judge Kenna stated:

The rules that govern the law of nuisances are uncertain enough without engrafting upon them a doctrine as essentially speculative as [aesthetics]. With that doctrine as a part of our equity jurisprudence, our courts are likely to be called upon in a large degree to embark in the business of city planning, with little to guide them except the infinite variations of taste and preference.

*Id.* at 618, 192 S.E. at 293.

Although there is an obvious connection between visual interference and public nuisance actions, this Article deals solely with the applicability of aesthetics to private nuisance law.

4. See *Missouri Pac. R.R. Co. v. Nicholson*, 460 So. 2d 615 (La. App. 1984); *Feldstein v. Kammauft*, 209 Md. 479, 121 A.2d 716 (1956); *Bradley v. Town of South Londonberry*, 64 Pa. Commw. 395, 440 A.2d 665 (1982).

5. See *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970); *Reid v. Architectural Bd. of Rev.*, 119 Ohio App. 67, 192 N.E.2d 74 (1963); *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955).

6. See *Salt River Valley Water Users’ Ass’n v. Arthur*, 51 Ariz. 101, 74 P.2d 582 (1937).

7. See *Kies v. Hollub*, 450 So. 2d 251 (Fla. App. 1984).

8. A New York court noted that, in the absence of any legislative mandate, the State Liquor Authority could not deny plaintiff’s registration for a unique label for a brand of vodka. *Hawkeye Distilling Co. v. New York State Liquor Auth.*, 118 Misc. 2d 505, 460 N.Y.S.2d 696 (1983). The court held that the Authority’s ruling could not be sustained simply as a matter of aesthetics: “Insofar as good taste may be relevant at all, it is worth recalling that the last public official who held the undisputed title of ‘Arbiter Elegantiæ’ (supreme judge of taste) was Gaius Petronius. He worked for Emperor Nero. Both came to a bad end.” *Id.* at 507, 460 N.Y.S.2d at 697. See also Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1 (1939).

with beauty, courts have predetermined their rejection of aesthetic nuisance actions.<sup>9</sup> Certainly, if individuals were allowed injunctive or monetary relief merely because their concept of beauty was not reflected in their neighbor's house, courts would become embroiled in innumerable, unresolvable lawsuits. Property rights are not, and should not be, subject to the vagaries of individual taste. But in allowing nuisance actions based on aesthetics, courts need not become judicial arbiters of beauty. Aesthetics, rather than a synonym for visual beauty, properly refers to the symbolic and emotional meanings conveyed by the visual environment, meanings which arise, in large part, from the cultural identity of the particular neighborhood.<sup>10</sup> Nuisance actions should not be based on whether a particular land use is "inherently ugly," but rather on whether the land use is visually consonant with established community values. Giving recognition to aesthetic interests would simply reflect the significant effect that visual harmony has on an individual's relation to his or her environment. Thus, judicial inquiry should focus not on an archetypal concept of beauty but simply on visual harmony within the social neighborhood setting. In this context, nuisance actions based on aesthetics would merely lead to judicial recognition of, and protection of, community values and preferences, without falling into the abyss of ontological subjectivity.

This Article examines the application of aesthetic policy to nuisance law. Part I summarizes the historical development of nuisance law and aesthetics. It analyzes the legal rationale utilized by courts when refusing to categorize certain unsightly uses as nuisances. Part II posits that judicial hesitancy to recognize aesthetic nuisances derives from an erroneous characterization of the term "aesthetics." Accordingly, it analyzes the nature of aesthetic valuation. This section concludes by offering an objective standard for courts to apply when dealing with aesthetic considerations and by demonstrating how aesthetic considerations can legitimately form the basis for nuisance actions. Part III reviews the acceptance by courts of nuisance actions for disturbances to the senses of hearing and smell. It outlines the standards used by the courts in such cases and demonstrates that the same criteria can and should be applied when dealing with visual interferences.

## I. NUISANCE LAW AND AESTHETICS: THE TRADITIONAL APPROACH

While the concept of nuisance does not admit to a simple definition,<sup>11</sup> the essence of private nuisance is an interference with the use and enjoyment of land.<sup>12</sup>

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9. Courts have utilized the following syllogistic logic: aesthetics is beauty; beauty is subjective; therefore, aesthetics is subjective. The courts reason that if aesthetic determinations are purely subjective, there can be no workable standards for the court to employ. Consequently, faced with a lack of objective standards, they deny redress for aesthetic interferences.

10. Perhaps the most exhaustive and thoughtful article dealing with the relationship between aesthetics and cultural stability is Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982).

11. W. PROSSER & P. KEETON, *THE LAW OF TORTS* § 86, at 616 (5th ed. 1984).

12. Prosser made the following classic observations:

The ownership or rightful possession of land necessarily involves the right not only to the unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation. Thus, many interferences with personal comfort, such as a dog next door which makes night hideous with his howls, which at first glance would appear to be wrongs purely personal to the landholder, are treated as nuisances because they

Property law has historically embraced the principle that landowners are entitled to the free use of their property. Since almost any use of land interferes in some manner with the free use and enjoyment of adjoining parcels, incidental, albeit intentional, interference to neighboring property from such use is considered *damnum absque injuria*.<sup>13</sup> Such inconvenience is merely the unavoidable cost of living in a developing, organized society. Nevertheless, if left unchecked, the right to interfere would soon become the right to destroy. Indeed, private nuisance law developed in England as a means of redress for activities conducted solely on one individual's land that nonetheless substantially interfered with the use and enjoyment of another individual's parcel.<sup>14</sup> Since the rights of neighbors are correlative, they must be counterbalanced. The law of nuisance has traditionally provided the legal forum for balancing these competing interests of landowners. Thus, while landowners should expect to endure some inconvenience, individuals must not use their parcels to do substantial, unreasonable injury to others. As Professor Martz aptly summarized: "When the balance is upset by an activity which exceeds the bounds of reasonableness and does substantial and disproportionate injury to the peaceable possession of others, such activity is said to be a nuisance and is actionable by those whose property interests it impairs."<sup>15</sup> Absolute freedom in the use and enjoyment of property is tempered by the obligation to limit such use and enjoyment so as not to unreasonably disturb another's occupation or use. Ownership of land thus includes not only the right to possession and use of the physical property itself but also the right to reasonable comfort and convenience in its occupation.

It is within this traditional framework of nuisance law that landowners first sought redress for offensive, nonaesthetic sights. *Bixby v. Cravens*<sup>16</sup> provides an early example. Here, two adjoining landowners argued over an existing alley fence.<sup>17</sup>

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interfere with that right to the undisturbed enjoyment of the premises which is inseparable from ownership of the property.

W. PROSSER & P. KEETON, *THE LAW OF TORTS* § 87, at 619 (5th ed. 1984).

13. The Restatement (Second) of Torts summarizes the symbiotic nature of the relationship that exists between adjoining landowners as follows:

Not every intentional and significant invasion of a person's interest in the use and enjoyment of land is actionable, even when he is the owner of the land in fee simple absolute and the conduct of the defendant is the sole and direct cause of the invasion. Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another.

RESTATEMENT (SECOND) OF TORTS § 822 comment g (1979).

14. What we now call the law of private nuisance originated in England. In the famous early nuisance suit of William Aldred's Case, 9 Co. Rep. 57b, 77 Eng. Rep. 816 (K.B. 1611), the plaintiff claimed that the hogsty of his neighbor caused "unhealthy odors . . . such that [the plaintiff]. . . could not come and go without being subjected to continuous annoyance . . ." See J. DUKEMINER & J. KRIER, *PROPERTY* 923 (1981).

15. 6A C. MARTZ, *AMERICAN LAW OF PROPERTY* § 28.22, at 65 (1954).

16. 57 Okla. 119, 156 P. 1184 (1916).

17. Since malice on the part of the defendant could not be established, the plaintiff was unable to enlist the aid of the "spite fence" cases. The modern trend is to permit landowners to enjoin spite fences that interfere with view or access

The plaintiff contended that the fence was a nuisance and should be removed since its visual unsightliness interfered with the use and enjoyment of his property.<sup>18</sup> The plaintiff stated that he took great pride in his home and in beautifying the grounds surrounding it and that the unsightly view presented by the alley fence caused him considerable annoyance. Utilizing traditional nuisance principles, the plaintiff argued that the defendants' unsightly fence should not be allowed to unreasonably interfere with the plaintiff's use and enjoyment of his land. In his complaint, the plaintiff requested that the court issue an injunction directing the defendants to remove the fence. The Supreme Court of Oklahoma refused. Interestingly, the court accepted the plaintiff's contention that the fence annoyed the plaintiff because of its unsightly nature. However, the court stressed that the defendants had a fundamental right to erect the fence and thereby add to the privacy and comfort of their property.<sup>19</sup> While recognizing that aesthetics can have an impact on an individual's use and enjoyment of land, the court posited that landowners are "not compelled to consult the 'aesthetic tastes' of their neighbors as to the kind of fence they should build or whether the smooth or rough side thereof faced in or out, or as to the color of the paint they should use thereon."<sup>20</sup> The court, in effect, refused to recognize a landowner's right to be free from a neighbor's unaesthetic land use.

*Bixby* reflects the traditional judicial response to nuisance actions based on aesthetic considerations. Courts simply refuse to recognize that unsightliness, without more, can give rise to an actionable nuisance.<sup>21</sup> An owner's use of property will not be restricted for purely aesthetic reasons. But why? Certainly, activities conducted on a parcel of land can and do affect the visual sensibilities of adjoining landowners. Such visual annoyance, in turn, can directly interfere with the landowners' use and enjoyment of their parcels.<sup>22</sup> Even the *Bixby* court conceded that the plaintiff "was doubtless annoyed and harassed at the unsightly view that the alley fence presented."<sup>23</sup> In support of the well-entrenched principle that nuisances cannot be based solely on aesthetic considerations, courts have offered two basic rationales. First, courts frequently rule that an unaesthetic use of land does not constitute a substantial invasion of interests of surrounding landowners in the use and enjoyment of their

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to light and air. Although some commentators have argued that the spite fence cases are a type of aesthetic nuisance action, the essential element in such cases is the existence of malice on the defendant's part. Only if a foundation of malicious intent has been established are the courts willing to rule that a fence must be removed or modified because it is unsightly. *Bixby v. Cravens*, 57 Okla. 119, 121, 156 P. 1184, 1185 (1916). See generally Note, *Aesthetic Nuisances in Florida*, 14 U. FLA. L. REV. 54 (1961).

18. Plaintiff offered evidence that he had spent much time and labor in the improvement and decoration of his grounds with shrubbery, flowers, walks, and driveways. The defendant's fence was constructed of plain pine boards. While the smooth side of the boards was painted white and faced defendant's house, the side facing plaintiff's house was rough and unpainted. *Bixby v. Cravens*, 57 Okla. 119, 122, 156 P. 1184, 1185 (1916).

19. *Id.* at 127, 156 P. at 1187.

20. *Id.*, 156 P. at 1187.

21. See *Haehlen v. Wilson*, 11 Cal. App. 2d 437, 54 P.2d 62 (1936); *Feldstein v. Kammauft*, 209 Md. 479, 121 A.2d 716 (1956); *Crabtree v. City Auto Salvage Co.*, 47 Tenn. App. 616, 340 S.W.2d 940 (1960); *Mathewson v. Primeau*, 664 Wash. 2d 929, 395 P.2d 183 (1964); *State Rd. Comm'n of W. Va. v. Oakes*, 150 W. Va. 709, 149 S.E.2d 293 (1966). See also 58 Am. Jur. 2d *Nuisances* § 44 (1971).

22. See *infra* notes 98-115 and accompanying text.

23. *Bixby v. Cravens*, 57 Okla. 119, 127, 156 P. 1184, 1187 (1916).

property.<sup>24</sup> Under this view, eyesores do not provide an interference substantial enough to be deemed unreasonable and therefore enjoined. Second, courts are reluctant to acknowledge aesthetic interests because they feel there are no objective standards by which to judge "matters of taste."<sup>25</sup> Concluding that ugliness as well as beauty depends on the eye of the beholder, courts refuse to infuse into the law the alleged uncertainty of aesthetic valuation.

### A. The Traditional Rationale

When faced with the issue of whether mere unsightliness can constitute a nuisance, courts routinely conclude that the interference involved is neither substantial nor unreasonable.<sup>26</sup> This conclusion seems grounded on the usually unsubstantiated belief that affronts to aesthetic taste cause only incidental, de minimis annoyances. As noted,<sup>27</sup> not every inconvenience or annoyance is sufficient to constitute a nuisance. Individuals living in organized communities must of necessity suffer a certain amount of inconvenience from their neighbors since practically all human activities interfere to some extent with others. Therefore, the law of nuisance does not concern itself with the petty disturbances of everyday life.<sup>28</sup> The Restatement (Second) of Torts summarized this principle as follows:

The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another. Liability for damages is imposed in those cases in which the harm or risk to one is greater

24. Noting that the roots of the aesthetic regulation problem were embedded in the common law nuisance cases, Professor Anderson stated:

Typically, a property owner sought to enjoin his neighbor's unaesthetic use, because such use substantially reduced his enjoyment of property. Plaintiff's most difficult problem was to prove that the invasion of his interest was substantial. Where defendant's use affected the physical condition of plaintiff's land, the substantial character of the invasion was apparent. Where plaintiff's comfort was severely reduced by extremes of sound and smell produced by defendant's use, the courts readily vindicated his interest by injunction or damages. But a use of land which was grossly ugly was seldom regarded as a substantial invasion of neighboring interests in the use and enjoyment of real property.

R. ANDERSON, *AMERICAN LAW OF ZONING* § 7.15, at 716 (3d ed. 1986).

25. See Broughton, *Aesthetics and Environmental Law: Decisions and Values*, 7 *LAND & WATER L. REV.* 451 (1972); Dukeminier, Jr., *Zoning for Aesthetics Objectives: A Reappraisal*, 20 *LAW & CONTEMP. PROBS.* 218 (1955); Newsome, *Zoning for Beauty*, 5 *NEW ENG. L. REV.* 1 (1969).

26. See *Feldstein v. Kammauft*, 209 Md. 479, 121 A.2d 716 (1956); *Crabtree v. City Auto Salvage Co.*, 47 Tenn. App. 616, 340 S.W.2d 940 (1960); *State Rd. Comm'n of W. Va. v. Oakes*, 150 W. Va. 709, 149 S.E.2d 293 (1966).

27. See *supra* note 15 and accompanying text.

28. The dividing line between petty and material disturbances is far from clear. While nuisance law seeks to protect landowners from interference in the use and enjoyment of their properties, there is clear recognition of the correlative rights of neighbors. The balance between their interests is struck by the ancient maxim, *sic utere tuo ut alienum non laedas*. Prosser's description of the balancing of these reciprocal rights and privileges is enlightening:

Most of the litigation as to private nuisance has dealt with the conflicting interests of landowners and the question of the reasonableness of the defendant's conduct: The defendant's privilege of making a reasonable use of his own property for his own benefit and conducting his affairs in his own way is no less important than the plaintiff's right to use and enjoy his premises. The two are correlative and interdependent, and neither is entitled to prevail entirely, at the expense of the other. Some balance must be struck between the two. The plaintiff must be expected to endure some inconvenience rather than curtail the defendant's freedom of action, and the defendant must so use his own property that he causes no unreasonable harm to the plaintiff. The law of private nuisance is very largely a series of adjustments to limit the reciprocal rights and privileges of both.

W. PROSSER, *THE LAW OF TORTS* § 89, at 596 (2d ed. 1971).

than he ought to be required to bear under the circumstances, at least without compensation.<sup>29</sup>

Following the Restatement's lead, courts typically characterize aesthetic considerations as matters of delicacy and fastidiousness, labeling alleged invasions of property interests based on aesthetics as insubstantial. The case of *B & W Management, Inc. v. Tasea Investment Co.*<sup>30</sup> is illustrative. Here, B & W Management sought to enjoin a nearby landowner from operating a surface parking lot. B & W claimed that the parking lot constituted a private nuisance because it damaged the aesthetics of the neighborhood. Offering absolutely no analysis for its conclusion, the District of Columbia Court of Appeals disposed of B & W's claim in a single, terse sentence: "B & W's claim for damage to 'the aesthetics of the area' based on neighborhood 'blight' does not amount to an assertion of the substantial interference with B & W's use and enjoyment of its land required to sustain a private nuisance action."<sup>31</sup> The fact that the court furnished no rationale for its conclusion is typical, rather than surprising.

Courts characteristically treat disturbances to one's visual sensibilities as disturbances unworthy of judicial cognizance. Indeed, even the adverbs utilized by the courts to describe alleged nuisances are imbued with this judicial prejudice. Unsightly objects are labeled as merely "disagreeable,"<sup>32</sup> simply "displeasing to the eye,"<sup>33</sup> or only "ugly."<sup>34</sup> Rarely do courts consider the full effect the unsightly use has on neighboring landowners' use and enjoyment of their property. There seems to be a deeply engrained proclivity on the part of courts to consider interferences with an individual's aesthetic interests as *per se* insubstantial and to discount radically the significance of aesthetic harms. Courts refuse to hold that that which is offensive to the sight warrants equitable relief. In short, aesthetic preferences are deemed frivolous and unworthy of legal protection.

The difficulty of establishing an objective standard by which to judge aesthetic interferences with the use and enjoyment of land is, perhaps, the greatest deterrent to judicial acceptance of an action for aesthetic nuisance. Courts have viewed aesthetic considerations as relative in nature<sup>35</sup> since, in their opinion, aesthetics admits of infinite variations of taste and preference.<sup>36</sup> What one individual may characterize as

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29. RESTATEMENT (SECOND) OF TORTS § 822 comment g (1979).

30. 451 A.2d 879 (D.C. App. 1982).

31. *Id.* at 883.

32. See *City of Independence v. Richards*, 666 S.W.2d 1 (Mo. App. 1983); *Kamo Elec. v. Cusbard*, 416 S.W.2d 646 (Mo. App. 1967); *Texas Power & Light Co. v. Jones*, 293 S.W. 885 (Tex. Civ. App. 1927).

33. See *Allison v. Smith*, 695 P.2d 791 (Colo. App. 1984); *Cromwell v. Ferrier*, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967).

34. See *City of Independence v. Richards*, 666 S.W.2d 1 (Mo. App. 1983).

35. The Wisconsin court stated the general rationale applied by the courts in these matters:

It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting.

*State ex rel. Carter v. Harper*, 182 Wis. 148, 159, 196 N.W. 451, 455 (1923).

36. See *Ness v. Albert*, 665 S.W.2d 1 (Mo. App. 1983); *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881, *appeal dismissed*, 302 U.S. 658 (1937).

beautiful, another, with equal conviction, may describe as abhorrent. What might be deemed as an architectural marvel by one landowner may be considered by a neighbor to be a "grotesque eyesore, reeking with the most base and vulgar human sensibilities."<sup>37</sup> This problem, framed by the courts as a problem in how to define beauty, takes on special significance in the legal context. Before courts feel justified in applying legal sanctions, workable standards are necessary.<sup>38</sup> However, courts complain that no such standards exist. Without workable, objective standards, aesthetic determinations would be fraught with subjectivity and uncertainty.

In the 1983 case of *Ness v. Albert*,<sup>39</sup> a Missouri court of appeals summarized this judicial concern. The plaintiffs, in that action, alleged that the presence of rusted objects, pieces of broken concrete, parts of old sinks and stoves, and a partially burned house trailer on the defendant's property were unsightly and therefore constituted a nuisance. While agreeing that the plaintiffs' evidence conclusively supported the allegation of aesthetic offense, the court ruled that unsightliness, without more, does not create an actionable nuisance. To support its decision, the court stated this now familiar judicial response:

Aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation, and vice versa. What is aesthetically pleasing to one may totally displease another—"beauty is in the eye of the beholder." Judicial forage into such a nebulous area would be chaotic. Any imaginary good from doing so is far outweighed by the lurking danger of unduly circumscribing inherent rights of ownership of property and grossly intimidating their lawful exercise. This court has no inclination to knowingly infuse the law with such rampant uncertainty.<sup>40</sup>

Therefore, even assuming that aesthetic disturbances can rise to a significant enough level to warrant redress, courts still hesitate to apply what they believe to be a primarily subjective standard based on individual taste. Because criteria for determining "beauty" have yet to be articulated,<sup>41</sup> courts fear that aesthetic judgments cannot be expressed with the requisite degree of precision. Absent objective standards, judicial activity in this area is likely to engender social prejudice and political favoritism as well as provide ample opportunities for capricious line

37. This was the comment of an acquaintance of mine upon seeing Chicago's Sears Tower for the first time.

38. In attempting to apply legal sanctions to aesthetics, courts have focused on one specific problem: how to define what is attractive and what is ugly. Professor Williams summarized the established concern of the courts and commentators:

The problem of how to define good taste, long debated among philosophers, has a special significance in a legal context; for when legal sanctions are involved, it is essential to define rather precisely what is permitted and what is not. Because of the obvious difficulty of drawing the line in such cases, the courts have long been reluctant to recognize the aesthetic factor as an appropriate basis for land use controls. In part this was originally because aesthetic preferences were once considered rather frivolous, not really worthy of legal protection; but the essential difficulty has remained, right up to this day—how to define workable and enforceable standards, equally applicable to all.

1 N. WILLIAMS, JR., *AMERICAN PLANNING LAW* § 11.02, at 244 (1974 & Supp. 1986).

39. 665 S.W.2d. 1 (Mo. App. 1983).

40. *Id.* at 2.

41. See B. BOSANQUET, *A HISTORY OF AESTHETICS* (1957); K. GILBERT & H. KUHN, *A HISTORY OF ESTHETICS* (1954); M. BEARDSLEY, *AESTHETICS FROM CLASSICAL GREECE TO THE PRESENT* (1966).

drawing.<sup>42</sup> Justice Kenna in his concurring opinion voiced the apprehensions of many in the legal community when he stated that “[t]he rules that govern the law of nuisances are uncertain enough without engrafting upon them a doctrine as essentially speculative as [aesthetics].”<sup>43</sup>

### B. *Changing Attitudes and Recent Developments*

While courts have refused to recognize aesthetic interferences as nuisances, a few cases contain noteworthy dicta to the contrary.<sup>44</sup> Perhaps the earliest,<sup>45</sup> and certainly the most frequently cited,<sup>46</sup> case supporting actions for aesthetic nuisance is *Parkersburg Builders Material Co. v. Barrack*.<sup>47</sup> Here the plaintiffs brought suit to enjoin a nearby landowner from using his property to store and dismantle wrecked automobiles. The plaintiffs contended, and the lower court ruled, that this use was enjoined as a nuisance solely because of its unsightliness. On appeal, the West Virginia Supreme Court observed:

Happily, the day has arrived when persons may entertain appreciation of the aesthetic and be heard in equity in vindication of their love of the beautiful, without becoming objects of opprobrium. Basically, this is because a thing visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes, and may produce a decided reduction in property values. Courts must not be indifferent to the truth that within essential limitations aesthetics has a proper place in the community affairs of modern society.<sup>48</sup>

Even given such dictum, the West Virginia Supreme Court nevertheless reversed the lower court on the ground that the neighborhood had not been proven to be residential. The court reasoned that unsightly things are not to be banned *per se*, but only if their location makes them unduly offensive to neighbors or the public.<sup>49</sup> Outside of established residential communities, automobile junkyards may not be

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42. Although commenting specifically on the regulation of aesthetics under the police power, the dictum of the Ohio Supreme Court is equally applicable to all instances of aesthetic line drawing:

It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard impractical as a standard for use restriction upon property. The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power.

*City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661–62, 148 N.E. 842, 844 (1925).

43. *Parkersburg Builders Material Co. v. Barrack*, 118 W. Va. 608, 618, 192 S.E. 291, 293 (1937). Kenna, J., concurring).

44. See *Feldstein v. Kammauft*, 209 Md. 479, 121 A.2d 716 (1956); *Yeager v. Traylor*, 306 Pa. 530, 160 A. 108 (1932); *Martin v. Williams*, 141 W. Va. 595, 93 S.E.2d 835 (1956); *State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923).

45. Some commentators have pointed to *Yeager v. Traylor*, 306 Pa. 530, 160 A. 108 (1932), as the first nuisance case to endorse aesthetic considerations. In *Yeager*, the court stated that if cars were to be parked on the roof of the defendants' proposed parking garage, "an effective screen must be provided. . .to hide the unsightly appearance which would result [from] such practice." *Id.* at 535, 160 A. at 109.

46. *Barrack* has been cited in over twenty-five cases and in numerous law review articles.

47. 118 W. Va. 608, 191 S.E. 368 (1937).

48. *Id.* at 612–13, 191 S.E. at 371.

49. *Id.* at 613, 191 S.E. at 371.



objectionable.<sup>50</sup> Nonetheless, *Barrack* continues to be one of the leading cases supporting the right of private litigants to impose aesthetic-based restraints. *Barrack* lends strong jurisprudential support to the principle that unsightliness is actionable.

Another recent case, *Hay v. Stevens*,<sup>51</sup> is likewise noteworthy for its dictum in support of recognizing aesthetic nuisance. In *Hay*, the plaintiffs asked the court to determine that a fence erected by their neighbors between the plaintiffs' property and the beach constituted a nuisance because of its unsightliness. The court began its analysis with the following forceful statement:

Although there is authority to the contrary, we begin with the assumption that in the appropriate case recovery will be permitted under the law of nuisance for an interference with visual aesthetic sensibilities. The difficulty, however, is in determining whether the interference complained of is of such gravity as to warrant relief.<sup>52</sup>

The court thereby gave direct recognition to actions for aesthetic nuisance.<sup>53</sup> However, while the court stated that the hogwire mesh fence was aesthetically displeasing, it denied relief because the fence was "not [of] unusual design"<sup>54</sup> and, therefore, all things considered, was "[not] definitely offensive."<sup>55</sup> Once again, a court seemed ready to admit aesthetic considerations into the realm of nuisance law, but the particular facts of the case did not lend support to the use of such considerations.

Within the past four years, two decisions have signaled the possible beginnings of a dramatic change in judicial attitude toward aesthetic nuisances.<sup>56</sup> In both of these decisions, the courts explicitly recognized a private right to recovery under the law of nuisance for interference with visual aesthetic sensibilities. Most notably, unlike *Barrack* and *Hay*, the courts' analyses of aesthetics were not mere *obiter dicta* but constituted the founding legal rationale of the decisions.

In the first case, *Foley v. Harris*,<sup>57</sup> the Supreme Court of Virginia affirmed a chancellor's decree enjoining the defendants from keeping wrecked automobiles on their lot. Although the defendants argued that mere offense to aesthetic sensibilities, without more, was insufficient to support injunctive relief, the court agreed with the chancellor's finding that the "old, battered, abandoned automobiles on the

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50. *Id.* at 613, 191 S.E. at 371. It should be noted that Judge Kenna, in a concurring opinion, dissented from the conclusions of the majority regarding basing nuisance actions on unsightliness. Judge Kenna argued that the court's dictum represented an unwarranted extension of the law of nuisance: "With that doctrine as a part of our equity jurisprudence, our courts are likely to be called upon in a large degree to [engage in] the business of city planning, with little to guide them except the infinite variations of taste and preference." *Parkersburg Builders Material Co. v. Barrack*, 118 W. Va. 608, 618, 192 S.E. 291, 293 (1937) (Kenna, J., concurring).

51. 271 Or. 16, 530 P.2d 37 (1975).

52. *Id.* at 20, 530 P.2d at 39.

53. In determining whether the defendants' unsightly fence was an unreasonable invasion of the plaintiffs' use and enjoyment of their property, the court applied the Restatement test: was the harm visited upon the plaintiffs by the hogwire fence outweighed by the utility of the defendants' conduct? *See* RESTATEMENT (SECOND) OF TORTS § 826 (1979). The defendants offered evidence that a steep bank on their property presented a severe attractive nuisance and therefore a fence was needed to protect children from falling off the edge of the bank. An insurance agent testified that before his company could provide comprehensive public liability insurance it would require that a fence be placed on the property to deter the public from going down to the bank. *Hay v. Stevens*, 271 Or. 16, 21, 530 P.2d 37, 40 (1975).

54. *Hay v. Stevens*, 271 Or. 16, 21, 530 P.2d 37, 39 (1975).

55. *Id.* at 21, 530 P.2d at 39-40.

56. *See* *Foley v. Harris*, 223 Va. 20, 286 S.E.2d 186 (1982); *Allison v. Smith*, 695 P.2d 791 (Colo. App. 1984).

57. 223 Va. 20, 286 S.E.2d 186 (1982).

lot . . . definitely 'obstruct[ed] the reasonable and comfortable use of property' of neighbors,'" and thereby constituted a nuisance.<sup>58</sup> According to the plaintiffs, the appearance of the cars made them self-conscious, and thus hesitant, about inviting people over for cookouts.<sup>59</sup> Affirming the decree of the trial court, the Virginia Supreme Court accepted the chancellor's ruling that unsightliness alone can form the basis of an action in nuisance. The court departed from its traditional construction of nuisance actions and held that an individual landowner has a right to be free from visual annoyances. In advancing this thesis, the court explained:

The phrase "use and enjoyment of land" is broad. It comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land, which inevitably involves an element of personal tastes and sensibilities, is often as important to a person as freedom from physical interruption with use of the land itself. The discomfort and annoyance must, however, be significant and of a kind that would be suffered by a normal person in the community.<sup>60</sup>

Two years later, in *Allison v. Smith*,<sup>61</sup> a Colorado court of appeals adopted a similar rationale and held that a legitimate but unsightly activity may constitute a private nuisance. In this case, the defendants had placed a number of inoperable automobiles, scrap material, pipe, and other "obnoxious debris"<sup>62</sup> on their property. The plaintiffs sued for damages and injunctive relief claiming, *inter alia*, that the sight of the defendant's land substantially interfered with the use and enjoyment of their property.<sup>63</sup> While noting that not all challenged activities found to be unsightly eyesores constitute an actionable private nuisance, the court nevertheless held that the facts of this case supported the plaintiff's suit. As the court summarized:

[L]egitimate but unsightly activity such as the accumulation of debris on land or the operation of a junkyard or auto salvage business may become a private nuisance if it is unreasonably operated so as to be unduly offensive to its neighbors, particularly when it is located in a residential district.<sup>64</sup>

According to the Colorado court, to constitute a nuisance, the activity must produce an unreasonable, substantial interference. In reaching its conclusion, the court stated that whether or not there is a substantial invasion of the plaintiffs' use and enjoyment of their land is to be measured by the standard of the effect of the invasion

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58. *Id.* at 29, 286 S.E.2d at 191. Relying on the case of *City of Newport News v. Hertzler*, 216 Va. 587, 221 S.E.2d 146 (1976), the defendants contended that the chancellor erred in enjoining them from keeping the automobiles on their lot since the evidence showed nothing more than offended aesthetic sensibilities. Under *Hertzler*, mere offense to aesthetic sensibilities was insufficient to support an action for injunctive relief. The *Foley* court distinguished *Hertzler*, stating that *Hertzler* dealt with temporary annoyances incident to the opening of a public park. *Foley v. Harris*, 223 Va. 20, 27-28, 286 S.E.2d 186, 190 (1982).

59. *Id.* at 24, 286 S.E.2d at 188.

60. *Id.* at 28, 286 S.E.2d at 190-91.

61. 695 P.2d 791 (Colo. App. 1984).

62. *Id.* at 793. Among the items defendants had accumulated on their property were a bulldozer, tons of scrap metal and pipe, large rigs, new and used construction materials, drums of petrochemicals, and large amounts of litter and rubbish. *Id.*

63. Additional evidence indicated that the defendants poured oil on the ground surrounding their residence. This oil, carried by rain and snow onto plaintiffs' land, entered the plaintiffs' water well, killed vegetation on their land, and created a persistent odor. *Id.* Notably, the court's decision focused solely on the unsightly aspect of the accumulated debris and rubbish; the court did not comment on the alleged trespass of the defendants' oil.

64. *Id.* at 794.

upon a normal person in similar circumstances.<sup>65</sup> Here, the court was convinced that the unsightly accumulation of debris met the standard.

Both *Foley* and *Allison* signal a departure from the long-held judicial antipathy toward actions for aesthetic nuisance. In both of these cases, the courts recognized that the visual environment can have a significant effect on an individual's use and enjoyment of land. Aesthetic considerations were characterized, at least potentially, as substantial interferences. For the first time, full judicial recognition was given to the significant effect an unsightly use may have on neighboring landowners' use and enjoyment of their property. In addition, the courts' recognition of the eyesores' substantial effects was not tempered by a concern for the lack of an objective standard. The courts readily settled upon the "sensibilities of the normal person" as the applicable standard for such cases. If the normal person in similar circumstances would characterize the invasion as substantial, then the unsightly use should be deemed a nuisance.

## II. TOWARD A THEORY OF AESTHETIC NUISANCE

When an individual brings a nuisance action based on aesthetic interests, the complaint normally alleges that the defendant has made and is continuing to make some visually offensive use of the defendant's property. Typically, such use is described as "unsightly," "grotesque," or simply "ugly." The visual offense the plaintiff experiences is thereby immediately associated with, and categorized in terms of, commonplace notions of beauty. "Unsightliness" is deemed to be the opposite of visual attractiveness; "ugliness" is commonly recognized as the absence of beauty. Not surprisingly then, courts usually begin their analysis of aesthetic considerations with the assumption that the terms "aesthetics" and "visual beauty" are fundamentally synonymous. Courts perceive that they are being asked to become beauty's "policemen" when they are asked to enjoin alleged eyesores as aesthetic nuisances. The purpose of such aesthetic regulation is assumed to be the proscription of offenses to visual sensibilities and the preservation or enhancement of beautiful environs. Framed in this manner, courts have maintained their historical hostility to nuisance actions based on aesthetic considerations. It is widely acknowledged that visual beauty belongs to the eye of the beholder; therefore, since visual beauty is, by nature, hopelessly subjective, courts fear there can be no workable standards for them to apply. In the view of the courts, the lack of reasonable standards must necessarily bar judicial intervention.

### A. Aesthetics as Visual Beauty

An analysis of visual beauty reveals the lack of any analytic standard and provides ample support for the judicial reluctance to base legal rights on aesthetic considerations. Although philosophers have been trying to discover empirically based qualities of beauty for centuries,<sup>66</sup> their endeavors have proven largely fruitless.

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65. *Id.* at 794 (quoting *Northwest Water Corp. v. Pennetta*, 29 Colo. App. 1, 7, 479 P.2d 398, 401 (1970)).

66. See M. BEARDSLEY, *supra* note 41.

Beauty, unlike some other natural forms, has resisted objectification. The so-called universal principles of beauty have yet to be uncovered although countless studies throughout history have analyzed such qualities as color, line, and proportion with the goal of discovering the same.<sup>67</sup> The idea of encapsulating the elements of beauty in a set of objective standards is indeed seductive. Humanity seems naturally "programmed" to strive toward ideals, and the concept of a universal standard of beauty is enticing. Nonetheless, the attempt to isolate a set of formal visual qualities which constitute beauty remains unsuccessful. Indeed, the notion that such an ontology exists is somewhat suspect given the disparity of aesthetic tastes which have existed among different societies, different generations, and different individuals. Numerous artistic styles have come into, and gone out of, fashion. There have been constant debates even among the most highly educated gallery curators over what is or is not beautiful. Anthropological studies show a disconcerting variance between cultures concerning what differing societies deem to be laudable architectural styles or artistic patterns. From the ancient Greek philosophers through the rationalism and empiricism of the Enlightenment and into the twentieth century analytical philosophies, debates have flourished regarding the criteria for evaluating artistic achievement.<sup>68</sup>

Despite such widespread relativism, a few recent studies claim that aesthetic evaluation can be objectively based.<sup>69</sup> One commentator<sup>70</sup> has gone so far as to conclude that these studies conclusively demonstrate that there is consensus in matters of aesthetics and that aesthetic judgments can be based on objective, ascertainable facts. In one study,<sup>71</sup> eighty-eight individuals were asked to rate a number of slides depicting natural scenes, urban scenes, and scenes combining both natural and man-made features. The investigators found that individuals greatly preferred the natural scenes over the urban scenes. But this hardly surprising result merely indicates that a group of individuals can agree on their reaction to visual stimuli, something neither the critics of aesthetic formalism nor the courts ever questioned. What the study did not demonstrate is that this preference for the natural over the urban would surface regardless of cultural, social, historical, or economic factors. Nor did the study isolate any objective criteria on which such aesthetic valuations can be based.

In another more comprehensive study focusing on the aesthetic qualities of rivers,<sup>72</sup> researchers identified forty-six descriptive characteristics and studied how these characteristics formed the basis for aesthetic judgments. From an allegedly objective, empirical measurement of characteristics found at a site,<sup>73</sup> the researchers

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67. *Id.*

68. *Id.*

69. See Shafer, Hamilton, & Schmidt, *Natural Landscape Preferences: A Predictive Model*, 1 J. LEISURE RES. 1 (1969); Kaplan, Kaplan, & Wendt, *Rated Preference and Complexity for Natural and Urban Visual Material*, 12 PERCEPTION & PSYCHOPHYSICS 354 (1972); Leopold, *Quantitative Comparison of Some Aesthetic Factors Among Rivers* (Geological Survey Circular 620, 1969).

70. See Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973).

71. Kaplan, *supra* note 69, at 354.

72. Leopold, *supra* note 69.

73. The study compared twelve selected river valleys in the Hells Canyon area of Idaho. After isolating forty-six descriptive categories (such as river width, depth, and velocity; water color; floating material; pollution; incidence of

claimed that they could predict the degree of the site's visual attractiveness to people. Again, however, the study's shortcomings are transparent. The identification of the initial forty-five characteristics was itself subjectively based and could very well have led to a mirroring of the researchers' aesthetic preferences with those of their subjects. Correspondingly, the fact that a small group of individuals from the same social stratum agreed that they preferred high mountains to low mountains and fast running rivers to slower ones does not demonstrate that high mountains or fast rivers aesthetically will be preferred by other peoples or cultures or, more importantly, *ought* to be preferred. These studies provide no objective, empirical measures for visual attractiveness. At a minimum, they succumb to the traditional critique of subjectivism. In the final analysis, they merely show that two individuals can agree that certain visual patterns are or are not pleasurable. They do not point to any objectively determinable, descriptive criteria on which courts may base aesthetic judgments. As Professor Fry stated at the turn of the century: "Like our predecessors we sought for the criteria of the beautiful, whether in art or nature. And always this search led to a tangle of contradictions or else to metaphysical ideas so vague as to be inapplicable to concrete cases."<sup>74</sup> In short, the search for objective criteria by which to determine an object's degree of beauty seems destined to failure.

### B. *Aesthetics as a Symbiotic Interaction*

Dismissal of aesthetic formalism as a basis for nuisance law by courts is readily defensible. However, by linking aesthetics with visual beauty, the courts predetermined their rejection of aesthetic nuisance actions. Such rejection reflects little more than the imprisonment of the courts in their own linguistic web. As long as the courts perceive they are being asked to become arbiters of taste,<sup>75</sup> their reluctance to decide private actions according to their own personal biases is not only understandable but is to be applauded. Yet, aesthetics is not simply a synonym for visual beauty. More appropriately, aesthetics deals with the interaction occurring between an individual and the visual stimuli of that individual's environment.<sup>76</sup> The symbiotic nature of this interrelationship demands that full weight be accorded to the individual's contribution to the visual experience. Perceptions are made within and evaluated against the entire sociocultural identity of the individual and such identity shapes the aesthetic experience itself. Consequently, rather than a mere synonym for beauty, aesthetics properly refers to the symbolic and emotional meanings conveyed to the individual by the visual environment. Seen in such light, aesthetics becomes, in large part, a function of the cultural identity of the neighborhood in which the individual is located and against which the valuation is sought to be made. To characterize something as

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litter; vistas; and erosion), a "uniqueness ratio" for each descriptive characteristic was calculated. Aesthetic value was assumed to be a function of uniqueness. *Id.*

74. R. FRY, *VISION AND DESIGN* 292 (1920).

75. See *supra* note 8 and accompanying text.

76. Several law review articles have commented on this interaction: Costonis, *supra* note 10; Williams, *Subjectivity, Expression and Privacy; Problems and Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977); Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW. 36 (1969); Dukeminier, Jr., *supra* note 25. Of the above articles, Costonis' is by far the most comprehensive.

unsightly is to state that it is visually dissonant to established community values and thereby evokes negative emotional responses from the neighborhood as a whole. The label "unsightly" is merely the linguistic term that expresses the conclusory, negative emotional response, a response emanating primarily from the sociocultural identity of the community.

Perhaps the gravest mistake is to think that an individual merely responds to an object's visual images without interacting with the visual perceptions themselves.<sup>77</sup> Such a theory of passive response is, perhaps, the major weakness of aesthetic formalism. Under the formalist view, beauty resides as an abstract property in the object itself and individuals are mere *tabula rasa* upon which the object's pure character is mechanically reflected. The individual is viewed as a mere receptor of external qualities and values. For the formalists, beauty exists independently of its perception, as a quality residing in the object itself. However, most modern aesthetic theorists insist otherwise.<sup>78</sup> Under the modern view, visual images are the result of a two-way process between the observer and the external environment.<sup>79</sup> The observer not only receives sensory data but interacts with the data and ascribes meanings to them. Indeed, the observer actively shapes the aesthetic experience. It is the observer's intellectual, psychological, and cultural histories which create the symbolic meanings the observer imparts to the sensory data.<sup>80</sup> Viewed in this manner, aesthetics becomes something quite different from the sensory perception of external beauty. An individual's emotional response to the visual perceptions as well as the creation of the visual form itself in the individual's mind are greatly dependent upon the individual's sociocultural background. It is not simply the qualities existing in the objects that cause them to be perceived as beautiful or ugly; rather, it is the individual who ascribes beauty or ugliness to the objects. Aesthetics, then, deals with the individual's symbolic, emotional response to visual perception, a response that is linguistically expressed by terms such as "beauty." As John Costonis observed, "[w]e do not so much *discover* aesthetically compelling properties in the environment, therefore, as *ascribe* them to it on the basis of our individual and cultural beliefs, values and needs."<sup>81</sup>

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77. Such a view had perhaps its strongest support from British empiricists. The empiricists viewed beauty as a quality which resided in the object itself. This "quality" acted mechanically upon the human mind through the senses. Under such philosophical theory, beauty existed as a kind of physical attribute of the object, apart from human perception, as did such physical qualities as weight and size. See E. BURKE, *A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL* (2d ed. 1759).

78. See S. LANGER, *FEELING AND FORM; A THEORY OF ART* (1953); K. LYNCH, *THE IMAGE OF THE CITY* (1960); R. ARNHEIM, *VISUAL THINKING* (1969); G. CLAY, *CLOSE-UP: HOW TO READ THE AMERICAN CITY* (1973).

79. Lynch made the following classic statement regarding the interrelationship:

Environmental images are the result of a two-way process between the observer and his environment. The environment suggests distinctions and relations, and the observer—with great adaptability and in the light of his own purposes—selects, organizes, and endows with meaning what he sees. The image so developed now limits and emphasizes what is seen, while the image itself is being tested against the filtered perceptual input in a constant interacting process. Thus the image of a given reality may vary significantly between different observers.

K. LYNCH, *supra* note 78, at 6.

80. J. Costonis has written perhaps the most comprehensive and thought-provoking article on the interrelationship between the law and aesthetic policy. Costonis, *supra* note 10.

81. *Id.* at 401.

If one acknowledges that aesthetics is a social construct rather than an ontological given, then an individual's aesthetic response to the visual environment is founded on the cognitive and emotional meanings that the visual patterns convey. The visual environment plays a central role in shaping an individual's and a community's identity. And that identity in turn shapes both the individual's and the community's perception of the environment. The individual builds associational bonds with the environment that become symbolic repositories of meaning. This network of meanings provides a stability that reinforces the individual's identity and develops a sociocultural cohesiveness. The individual's aesthetic response is, therefore, in large measure, a product of the individual's sociocultural environment. The neighborhood is often the focus of this sociocultural identity and provides a complex array of cognitive and emotional meanings to the individual. Identity-nurturing associational bonds grow and bind the individual with the visual form of the neighborhood.<sup>82</sup> This explains why different individuals, communities, societies, and historical periods have embraced widely divergent aesthetic norms.<sup>83</sup>

Beauty is not an abstract quality unaffected by time, culture, or personal perception, but merely a linguistic term expressing the individual's positive response to the meanings and associations conveyed by, and perceived within, the visual environment. Because these meanings and associations are, in part, a product of the visual environment, it is not surprising that so much of aesthetic regulation is based on the preservation of the visual identity and cultural stability of the neighborhood.<sup>84</sup> The pyramidal house within the classic neo-Tudor community is labeled "unsightly" precisely because it threatens the sociocultural identity and continuity of the community. Asking whether the pyramidal house is in itself architecturally stylistic misstates the actual concern. The house is unsightly because it causes cognitive dissonance with the existing environment, not because it lacks certain qualities of an ontological ideal. Aesthetics is a product of the network of meanings and associations that the visual environment conveys; it contributes to the individual's psychological and emotional stability by reinforcing the associational bonds the individual has developed with the visual environment.<sup>85</sup> Indeed, in advancing his theory on cultural stability, Costonis viewed "controversies about 'beauty' [to be] surrogates for disagreements about environmental change itself."<sup>86</sup> When discussing the reactions of individuals to their visual environment, Costonis argued that "[w]hat [individuals and groups] seek when they press aesthetic demands . . . are measures that will function, in essence, as socially homeostatic devices . . . . [T]he goal of these measures is to regulate the pace and character of environmental change in a manner

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82. The associational bonds that exist between the community and the individual equally affect the individual's other perceptions. What one deems to be an offensive odor depends, in part, on his or her sociocultural background. For example, cow dung is used in many parts of the world as a fuel and a floor covering; however, other societies view animal feces as abhorrent and physical contact with the same as taboo.

83. M. BEARDSLEY, *supra* note 41.

84. See Costonis, *supra* note 10, at 430.

85. This is not to argue that an individual will grow to value the physical environment in which he or she was raised above all others. Certainly, persons raised in slum-conditions want to leave the same and many city dwellers speak of escaping to the countryside. Very often, the physical environment imparts deeply negative meanings.

86. Costonis, *supra* note 10, at 419.

that precludes or mitigates damage to their identity . . . ."<sup>87</sup> Both individual and community identity are closely linked to the environment's symbolic import. Because of this linkage, aesthetic considerations evidence more than random individual preferences; they evidence deeply engrained community values.

A survey of current efforts in landmark and historic district preservation supports this view of aesthetics as associationally-based. Many landmarks or historic districts are architecturally suspect, yet enthusiastically supported. While the preservation of many of these structures would seem indefensible to almost any of the theories based on aesthetic formalism,<sup>88</sup> their attraction is immediately evident when one notes their symbolic import. Landmarks and historical districts provide both identity and cultural stability; they are visible loci of meaning and provide orientation for the individual's emotional and cognitive needs. Consequently, the pigeon-stained, black-sooted War Memorial in Public Square in downtown Cleveland<sup>89</sup> continues to enjoy an aesthetic preeminence to the people of Cleveland, even though most visitors decry its visual blight.

Cemeteries provide another example.<sup>90</sup> While several decisions have enjoined cemeteries as a property use offensive to the sight<sup>91</sup> (and thereby to the use and enjoyment of an individual's home), the land use itself is relatively innocuous. The patterned green spaces which are characteristic of cemeteries normally would be associated with aesthetically pleasing environs.<sup>92</sup> However, cemeteries are consistently considered to be visually offensive. Such a result is easily explicable within the context of the meanings engendered by the visual perception. Although lushly landscaped, cemeteries are symbols of man's mortality and act as "constant reminder[s] of death."<sup>93</sup> The association between cemeteries and human mortality colors the aesthetic valuation. Cemeteries are judged to be unsightly primarily because of their cognitive dissonance with established community values, not because of their inherent visual character.

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87. *Id.* at 420.

88. Aesthetic formalism sought to discover objective canons of beauty. Objects were beautiful insofar as they possessed archetypal features of color, line, and proportion. While the so-called "universal" principles of beauty have never been categorized, it seems clear that aesthetic formalists would have little difficulty in labeling many historic landmarks as "unsightly."

89. The War Memorial is at the geographical center of the city. If one enters the city by subway, the War Memorial is one of the first structures that greets the eye upon emerging to street level. While downtown development efforts have been attempting to beautify the Public Square area, the War Memorial is a constant concern. In recent years, a new roof has been placed on the Memorial and the lawns surrounding it have been attractively landscaped.

90. Professor Cooley made one of the earliest associations between cemeteries and aesthetic nuisance. Professor Cooley's summation of "things which merely offend the taste" included funeral homes and cemeteries. T. COOLEY, *TORTS* 576 (student's ed. 1907).

91. See *Jones v. Trawick*, 75 So. 2d 785 (Fla. 1954); *State ex rel Cunningham v. Feezell*, 218 Tenn. 17, 400 S.W.2d 716 (1966); Annotation, *Cemetery or Burial Ground as Nuisance*, 50 A.L.R.2d 1324 (1956).

92. Many cemeteries resemble parks. They are usually impeccably landscaped and scrupulously maintained. We seem to convey our respect to the dead, in part, by placing their remains in visually pleasing surroundings.

93. *May v. Upton*, 233 Miss. 447, 451, 102 So. 2d 339, 340 (1958). While cemeteries are usually visually attractive, they often are felt to be visually depressing because of the activities they suggest. See *Overby v. Piet*, 163 So. 2d 532 (Fla. App. 1964); *Perry Mount Cemetery Ass'n v. Netzel*, 274 Mich. 97, 264 N.W. 303 (1936); *Street v. Marshall*, 316 Mo. 698, 291 S.W. 494 (1927).



### C. The Case for Aesthetic Nuisance

In order to base a nuisance action on aesthetic considerations, the individual must demonstrate that the defendant's land use is unsightly and that such unsightliness substantially and unreasonably interferes with the individual's use and enjoyment of his or her property. As noted,<sup>94</sup> "unsightliness" is not to be gauged against an ontological continuum of abstract beauty. Unsightliness is, in essence, a conclusion that the visual form is incongruous with the existing sociocultural matrix. This visual dissonance disrupts the individual's historical associational bonds and generates the negative response. Unsightliness, then, is a direct result of the symbolic and emotional meanings conveyed by the visual environment, meanings which arise, in large part, from the sociocultural identity of the particular neighborhood.<sup>95</sup>

The case of *State ex rel Stoyanoff v. Berkeley*<sup>96</sup> is illustrative. This case dealt with the Stoyanoffs' attempt to construct a house of unusual design within an established residential area of St. Louis. Though the proposed modernistic residence was widely considered to represent excellence in architectural design, the residence was nevertheless labeled as "unsightly" and was vehemently opposed by the neighborhood within which the Stoyanoffs sought a building permit.<sup>97</sup> Not surprisingly, the neighborhood consisted of a community of houses of conventional architectural design. The residents had formed deep associational bonds with their neighborhood's conventional design. The proposed residence therefore threatened, in part, their sociocultural identity. Because of the visual dissonance associated with the differing architectural style, the community deemed the residence to be aesthetically repugnant. In short, what other communities may have labeled as an "accomplishment of design," the residents of the City of Ladue characterized as "unsightly."

#### 1. The Substantial Nature of Aesthetic Interference

Even if the landowner can demonstrate to the court's satisfaction that the defendant's land use is unsightly, the landowner must further show that such unsightliness substantially and unreasonably interferes with the use and enjoyment of the landowner's property. As was outlined above,<sup>98</sup> courts have routinely characterized aesthetic considerations as matters of delicacy and have assumed that interference with an individual's aesthetic preferences results in only incidental annoyance. However, with the resurgence of popular interest in the visual environment and with recent psychological and sociological studies providing additional evidence of the effects that aesthetics has on the general welfare, ample grounds exist for challenging this traditional court bias.

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94. See *supra* notes 66-74 and accompanying text.

95. See *supra* notes 76-87 and accompanying text.

96. 458 S.W.2d 305 (Mo. 1970).

97. *Stoyanoff* challenged the zoning ordinance that set up certain architectural controls. The plaintiffs' building permit for their unusually designed house was denied because the city's architectural board disapproved of the design in light of the standards set forth in the city ordinances. The plaintiffs alleged that the ordinances were void for vagueness and that, in attempting to serve aesthetic objectives, the ordinances went beyond the state enabling legislation. *Id.* at 306.

98. See *supra* notes 26-34 and accompanying text.

Commentators have noted a change over the past sixty years in the public's attitude toward aesthetics as a source of legal rights.<sup>99</sup> During the industrialization of America,<sup>100</sup> society favored economic development. Environmental resources were presumed to be limitless and issues of unsightliness took a backseat to land development. However, once society reached a comfortable level in its accumulation of material goods, aesthetic considerations began to regain prominence. Attention focused on the visual environment and concern grew over the squandering of the nation's natural resources.<sup>101</sup> With this shift in social values came a change in judicial attitudes. Courts have become less willing to sacrifice aesthetic interests upon the altar of industrial progress.<sup>102</sup> While the invasion of aesthetic sensibilities was once of little concern to the courts, the relatively recent change in societal attitudes has made aesthetics an increasingly important judicial consideration.<sup>103</sup>

No case has had a more profound impact upon bringing aesthetics within the realm of legitimate jurisprudential concern than *Berman v. Parker*.<sup>104</sup> *Berman* was an eminent domain case in which a governmental agency sought to acquire private property in an urban renewal area for the purpose of selling it to other private parties for redevelopment. While the plaintiff landowner contended that it was not within the power of the legislative branch to acquire land for the purpose of creating a "more attractive community,"<sup>105</sup> the United States Supreme Court observed that an oppressive visual environment can "suffocate the spirit" as well as "make living an almost insufferable burden."<sup>106</sup> Likewise, the Court reasoned that unsightly structures may "be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn" and may "despoil a community as an open sewer may ruin a river."<sup>107</sup> In affirming the district court's dismissal of the complaint, Justice Douglas, speaking for the Court, offered the following rationale in support of the Court's acceptance of aesthetic considerations:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the

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99. See 1 N. WILLIAMS, JR., *supra* note 38, §§ 11.03–11.12; Dukeminier, Jr., *supra* note 25.

100. While nuisance law could have acted as a significant restraint to the industrialization of America, judges in fact applied nuisance law so as to favor economic subsidization. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977); Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974).

101. In the mid-sixties, Professor Reich related stories of how business persons, housewives, and other individuals from all avenues of society sought to stop the environmental damage resulting from commercial expansion by physically placing their bodies in the way of bulldozers and other heavy construction vehicles. See Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966). Recent history is full of instances of individuals using legal, political, and physical means to prevent the destruction of what they deem to be essential environmental resources, such as scenic views, trees, landmarks, and forests.

102. See Symposium, *Law and the Environment*, 55 CORNELL L. REV. 663 (1970); Symposium, *Control of Environmental Hazards*, 68 MICH. L. REV. 1073 (1970). Commenting on the change in the values of the public, Senator Jackson stated "we are entering an era in which qualitative values and aesthetic factors are considered as important as material wealth." Jackson, *Foreword: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073 (1970).

103. Professor Williams has provided perhaps the most thorough commentary on the evolution of aesthetic jurisprudence. See 1 N. WILLIAMS JR., *supra* note 38, §§ 11.03–11.21.

104. 348 U.S. 26 (1954).

105. *Id.* at 31.

106. *Id.* at 32.

107. *Id.* at 32–33.

legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.<sup>108</sup>

*Berman* heralded a new era of aesthetic regulation.<sup>109</sup> Based on *Berman*, aesthetics has become an appropriate subject for police power regulation. Instead of being viewed as a mere "matter of luxury and indulgence,"<sup>110</sup> aesthetic considerations have emerged as essential elements in the preservation of an individual's and a community's "quality of life." Since 1955, many federal and state courts have upheld a wide variety of aesthetically oriented regulations.<sup>111</sup> Courts have become increasingly sympathetic to aesthetic controls, reflecting the growing appreciation of aesthetic values in today's society. Such judicial expansion of the police power to include within the "general welfare" the minimization of discordant and unsightly surroundings reveals an increased recognition of, and reverence for, aesthetic criteria. As one court stated, "[i]t is no longer to be doubted that [community attractiveness] is an appropriate consideration within the statutory criterion of the 'general welfare.'"<sup>112</sup>

Far from being insubstantial matters of delicacy, aesthetic considerations have gained considerable judicial respect. It would be highly incongruous for courts to afford aesthetics such prominence in police power matters, but reject the application of the same considerations to other legal actions such as nuisance. Indeed, the current trend toward the legitimatization of aesthetic zoning establishes aesthetics as a major societal concern. Judicial recognition of the considerable impact that aesthetics has on humans is inescapable. Courts can no longer deny that interference with an individual's aesthetic preferences can, and does, cause a substantial interference with that individual's use and enjoyment of property.

Social and psychological studies concerning the nexus between aesthetics and an individual's mental and emotional well-being further highlight the significance of aesthetic considerations. Many institutions have recognized this connection for years. Educators have noted that aesthetically pleasing classrooms stimulate learning.

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108. *Id.* at 33.

109. *Berman* has been cited in over one hundred cases and in over twenty jurisdictions. These cases have upheld police power regulations aimed at protecting aesthetic, spiritual, cultural, and "quality of life" goals.

110. Prior to *Berman*, courts demonstrated little willingness to curtail private property rights on the basis of aesthetic considerations. Commenting on the ability to use the police power to support billboard regulation, a New Jersey court observed:

No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.

*City of Passaic v. Patterson Bill Posting Co.*, 72 N.J.L. 285, 287, 62 A. 267, 268 (1905).

111. See *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Gentry v. City of Norwalk*, 196 Conn. 596, 494 A.2d 1206 (1985); *Jasper v. Commonwealth*, 375 S.W.2d 709 (Ky. 1964); *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 P.2d 565 (1982); *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965); *State ex rel American Oil Co. v. Bessent*, 27 Wis.2d 537, 135 N.W.2d 317 (1965); *State ex rel Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955), *cert. denied* 350 U.S. 841 (1955).

112. *Clary v. Borough of Eatontown*, 41 N.J. Super. 47, 67, 124 A.2d 54, 64 (1956). *Clary* upheld larger lot-size requirements in a predominantly low-income municipality in northern Monmouth County.

Companies remodel their offices knowing that attractive environs increase their employees' efficiency. Prisons and mental institutions are often designed pursuant to set aesthetic guidelines in order to maximize the emotional stability of the residents. In a recent study which examined the effects of certain environmental attributes on overall personal satisfaction, the visual environment proved significantly more important to individuals than noise, traffic, or even air pollution.<sup>113</sup> The fact that one's visual sensibilities have a substantial effect on one's physical and mental health is no longer seriously debated.<sup>114</sup> Few people would even attempt to argue that living next to a run-down, unpainted residence would not negatively influence their emotional state. Aesthetics seems to be an integral part of the individual's social and psychological well-being. While humans have recognized this fact for centuries, the courts are only recently giving full recognition to the nexus. Professor Dukeminier's comment regarding the significance of aesthetic considerations, though made over thirty years ago, remains timely:

Our communities need to achieve an environment that is emotionally satisfactory, that effects a reduction in purposeless nervous and physical tensions of the inhabitants. When the inner life of an individual is out of balance, anxiety occurs, expressing itself in a number of socially destructive ways. Architecture, indeed every object in the individual's aesthetic continuum, has a direct effect upon the equilibrium of his personality and upon the happiness and richness of his life.<sup>115</sup>

## 2. An Objective Standard for Aesthetics

The problem of finding an objective standard against which the courts can measure interferences with visual sensibilities has traditionally provided the principal obstacle to recognition of actions based on aesthetic nuisance.<sup>116</sup> Courts have perceived that there are no stable standards on which to base their judicial determinations, and, fearful of both arbitrary and capricious decisionmaking, refuse to sustain nuisance actions based on aesthetic considerations. As noted above,<sup>117</sup> such rationale may be defensible when the inquiry involves weighing competing views of

113. Herting & Guest, *Components of Satisfaction with Local Areas in the Metropolis*, 26 THE SOC. Q. 99 (1985). This study investigated which features of the Seattle, Washington metropolitan region are most strongly related to overall satisfaction within the community. Professor Herting concluded:

The second most important set of predictors relate to the physical environment. In particular, the general condition of the housing and visual appearances are perceived as most important to the good community. Noise, traffic and air quality levels seem to assume a lesser role. Thus, we might think of the relative static visual environment or "appearance" as being most important. *Id.* at 108.

114. Although the connection between visual environment and personal well-being has been accepted by scholars for a number of years, there is still a lack of empirical evidence which demonstrates a direct one-on-one correlation between the physical environment and an individual's physical and mental health. This lack of direct evidence results from the difficulty of isolating the effects of visual sensation from other environmentally produced effects. For example, while the visual dissonance produced by a deteriorating neighborhood causes depression and anxiety, such feelings are, among other things, also the result of the individual's social and economic situation. See generally E. SYDENSTRICKER, *HEALTH AND ENVIRONMENT* (1933); T. RYAN & P. SMITH, *PRINCIPLES OF INDUSTRIAL PSYCHOLOGY* (1954); PERSONAL CHARACTER AND CULTURAL MILIEU (D. Haring ed. 1949); Maslow & Mintz, *Effects of Aesthetic Surroundings*, 41 J. PSYCH. 247 (1956); Wohlwill, *The Physical Environment: A Problem for a Psychology of Stimulation*, 22 J. SOC. ISSUES 29 (1966); Thompson, *Visual Squalor, Social Disorder or a New Vision of the "City of Man"*, 145 ARCHITECTURAL REC. 161 (1969).

115. Dukeminier, Jr., *supra* note 25, at 231.

116. See *supra* notes 35-40 and accompanying text.

117. See *supra* notes 66-74 and accompanying text.

visual beauty. History paints a vivid picture of the subjective nature of human taste; visual beauty has encompassed widely divergent characteristics within different cultures and across different periods. Insofar as the court is being requested to bar a certain land use because the use does not conform to some unchanging ideal of beauty, the court is correct in refusing to become involved. The subjectivity of beauty is an inescapable fact<sup>118</sup> which courts ought to, and do, recognize. However, equating visual beauty with aesthetics is far more avoidable, and, ultimately, mistaken.<sup>119</sup> Aesthetics properly refers to the body of symbolic and emotional meanings which individuals attach to their visual environment. Land uses that are visually consonant with established community patterns and values are accepted; those uses that create visual dissonance are rebuked. A specific land use is characterized as unsightly primarily because it deviates from individual and community expectations.<sup>120</sup> Seen in this light, aesthetic valuation becomes manageable. No longer do the courts have to deal with an elusive ideal of ontological beauty in which they become Vlademirs engaged in the proverbial search for beauty's Godot.<sup>121</sup> Unsightliness is judged against established community patterns and values. Court recognition of aesthetic nuisance actions promotes and protects common values and preferences; certainly, this is a time-honored goal of our legal system.<sup>122</sup> Giving recognition to aesthetic interests, therefore, simply acknowledges the significant effect that visual perception has on the individual's use and enjoyment of property and legitimizes and supports both the individual's and community's sense of identity.

The average person with ordinary sensibilities is a suitable standard against which to measure aesthetic interferences. If normal persons living in the area or community would regard the defendant's land use as a substantial interference with their use and enjoyment of land, then such invasion should be characterized as both significant and unreasonable. The objective standard upon which interferences with visual sensibilities are to be judged is, therefore, provided by the "objective, normal individual."<sup>123</sup> Such a standard is easily applied by the courts and ultimately supportive of community values and identity. Unsightliness is the result of visual dissonance, a phenomenon normally indicating that the use threatens the socio-cultural identity of the community. Since an individual's aesthetic valuations are reflective of the individual's associational bonds, the community itself should be no less reflective of the same aesthetic valuations. Nuisance actions based on aesthetic considerations are evaluated against community standards. Consequently, when evaluating aesthetic considerations, courts need not become referees of individual

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118. *But see* Note, *supra* note 70.

119. *See supra* notes 77-81 and accompanying text.

120. *See supra* notes 82-87 and accompanying text.

121. S. BECKETT, *WAITING FOR GODOT* (1957).

122. *See generally* S. MERMIN, *LAW AND THE LEGAL SYSTEM* (2d ed. 1982); L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 B.Y.U. L. REV. 89.

123. Note that the standard is not determined by the plaintiff's idiosyncrasies but by what persons of "ordinary sensibilities" can tolerate. Thus, the so-called hypersensitive individual (whether in the area of noise, smell, or aesthetics) cannot force his or her "sensitivity" upon the community. Similarly, one need not fear that property rights will be sacrificed to the pleasure of an ultra-aesthetic taste.

taste; rather, courts are simply asked to determine if there is an established visual pattern within the neighborhood and, if so, whether the use complained of threatens the established pattern. All the courts ultimately are called upon to determine is the pervasiveness of the neighborhood's visual commons. Uses which substantially interfere with visual sensibilities of normal persons in the community become, under this approach, legally actionable as aesthetic nuisances.

### 3. *A Critique of Aesthetic Nuisance*

By basing aesthetic nuisance actions on the sensibilities of average individuals in the community, community values are enhanced. A neighborhood's strong preference for a certain visual environment will gain significant protection. Cultural stability, and thereby individual well-being, will be fostered. An individual's enjoyment of land is inseparable from community-held concepts of congruity. Certainly, the law of nuisance has curbed a wealth of other forms of individual behavior when such behavior radiated external impacts.<sup>124</sup> There is simply no reason for treating aesthetic considerations differently.<sup>125</sup> To allow an individual to engage in a land use that disrupts the community's visual environment is to allow that individual to unilaterally impose his or her preferences to the detriment of other individuals in the neighborhood.

While admitting that our laws afford strong protection to certain individual rights such as self-expression,<sup>126</sup> it remains unreasonable to refuse legal protection to individuals when the use and enjoyment of their property is threatened by visual interference. The very basis of nuisance actions is the recognition that the right of individuals to the use of their property is subject to the limitation that their neighbor's use and enjoyment should not thereby be unreasonably constrained. By proscribing land uses which are unreasonably offensive to the visual sensibilities of the average person in the community, actions based on aesthetic considerations advance the basic purposes underlying nuisance theory. An individual should not be allowed to unilaterally impose his or her private preferences for the visual environment upon the members of the community, especially when such imposition creates a significant impact upon individual and community values and identity. Aesthetic values need not, and should not, be sacrificed in the name of individual freedom. Hopefully, courts will no longer find it necessary to stand idly by while individuals are forced to endure grossly discordant environmental invasions. So long as the courts maintain their strong regard for self-expression and individual privacy,<sup>127</sup> aesthetic nuisance

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124. A nuisance has been held to be anything which (i) "disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable," (ii) "interferes with the right of a citizen, either in person, property, the enjoyment of property, or his comfort," or (iii) materially lessens the enjoyment of property or the "physical comfort of persons in their homes." *Martin v. Williams*, 141 W. Va. 595, 610-11, 93 S.E.2d 835, 844 (1955). While a complete cataloguing of all the uses of property which have been held to be nuisances is a practical impossibility, the term "nuisance" has been applied to almost anything that can obstruct the reasonable and comfortable use of property. See 58 Am. Jur. 2d *Nuisances* §§ 61-97 (1971); 66 C.J.S. *Nuisances* §§ 26-75 (1950).

125. See *infra* notes 151-64 and accompanying text.

126. See *infra* note 131 and accompanying text.

127. Several commentators have provided extensive analysis regarding the problems of privacy and autonomy which are inherent in the area of aesthetic regulation. See *Williams*, *supra* note 76; *Costonis*, *supra* note 10.

actions will maintain their legitimacy. Private litigants must be allowed to protect aesthetic values which are deeply engrained in their own, and their community's, identity.

In addition to protecting against unreasonable invasions of an individual's visual sensibilities, recognition by the courts of an action for aesthetic nuisance should produce beneficial effects in the community.<sup>128</sup> Since aesthetic valuations are reflective of associational bonds formed within the sociocultural environment of the community, similar aesthetic valuations should be reflected in the community itself. An individual's aesthetic preferences commonly are part and parcel of widely held community values. The individual's aesthetic judgment, therefore, often parallels the community value structure. By granting legal protection against certain forms of visual dissonance, community values will likewise be protected. Visual configurations help stabilize the sociocultural values of the community; patterns of community preference are the rule, not the exception. Since aesthetic sensibilities are weighed against the sensibilities of the average person of the community, unsightly, and therefore abatable, land uses constitute uses which severely impact the community itself. Successfully enjoining a landowner from placing rusted piles of auto parts on his or her front lawn does more than protect a neighbor's enjoyment of land; the rusted pile visually intrudes upon the aesthetic continuum of the entire community and, therefore, its enjoinder contributes to community stability. A system of private nuisance actions for aesthetic invasions thus would facilitate harmonious community functioning.<sup>129</sup>

The community's aesthetic continuum certainly has a significant, direct effect upon the community's emotional equilibrium. Professor Leighty pointed to this connection when arguing for aesthetic-based environmental controls: "If 'reasonable aesthetic satisfaction' is one of the minimum requirements for an adequate environment, then emphasis on safety and public health to the exclusion of visual protection could lead to a sterile and insipid existence and a loss of 'public happiness.'"<sup>130</sup> Arguably, a neighborhood needs an environment which is emotionally satisfying on a community level no less so than its individual counterparts. Because of the

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128. See *supra* notes 82-97 and accompanying text where the nexus between individual aesthetic judgments and community values has been traced.

129. Commenting on the value that aesthetics has on our community well-being, Dukeminier stated:

Now it seems fairly clear that among the basic values of our communities, and of any society aboriginal or civilized, is beauty. Men are continuously engaged in its creation, pursuit, and possession; beauty, like wealth, is an object of strong human desire. Men may use a beautiful object which they possess or control as a basis for increasing their power or wealth or for effecting a desired distribution of . . . one or all of the other basic values of the community, and, conversely, men may use power and wealth in an attempt to produce a beautiful object or a use of land which is aesthetically satisfying. It is solely because of man's irrepressible aesthetic demands, for instance, that land with a view has always been more valuable for residential purposes than land without, even though a house with a view intruding everywhere is said to be terribly hard to live in. Zoning regulations may, and often do, integrate aesthetics with a number of other community objectives, but it needs to be repeatedly emphasized that a healthful, safe and efficient community environment is not enough. More thought must be given to appearances if communities are to be really desirable places in which to live. Edmund Burke—no wild-eyed radical—said many years ago, "To make us love our country, our country ought to be lovely." It is still so today.

Dukeminier, Jr., *supra* note 25, at 224-25.

130. Leighty, *Aesthetics as a Legal Basis for Environmental Control*, 17 WAYNE L. REV. 1347, 1374 (1971).

interrelationship between the individual and the community, judicial acceptance of aesthetics as a basis for nuisance actions would help preserve individual identity and encourage neighborhood stability.

Perhaps the most emotional argument against the legitimization of aesthetic nuisances concerns the stifling effect such actions may have on individual creativity and expression. Cries of invasion of individual liberty and privacy are heard whenever individual preference is forced to comport with community norms. By granting an action for aesthetic nuisance, certain property uses which were previously permitted could become proscribed. Junk-laden front lawns, pink polkadotted walls, or triangular houses may cause such interference with the visual commons of the neighborhood that courts would find each to be a nuisance in its particular setting. Such holdings would quickly engender charges of regimentation and claims that such actions restrict artistic freedom and experimentation. Indeed, threshold questions are likely to be immediately raised concerning the impact of such actions on the defendant's first amendment freedoms.<sup>131</sup> Not surprisingly, the owners of the rusted auto parts often argue the self-expressive nature of their junk piles; and the owners of the pyramidal residences decry the demise of architectural uniqueness and innovation and the suppression of their "geometric" speech.

While our society traditionally affords such arguments a certain emotional persuasiveness, they quickly become suspect upon closer examination. Maximization of individual and community benefit is enhanced by judicial acceptance of aesthetics. While particular individuals may have to curtail various land uses that interfere with the visual environment of others, they would be forced to do so only when such interference is unreasonable. Nuisance theory states that individuals do not have an unbridled right to affect the use and enjoyment of their neighbors' property. Court recognition of aesthetic considerations encourages continuation of established community values.<sup>132</sup> Correspondingly, court rejection of actions for aesthetic nuisances

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131. It is not within the scope of this Article to comment in detail on the first amendment concerns raised by aesthetic nuisance theory. In terms of first amendment analysis, it is relatively clear that a constitutional issue is not raised merely because an individual is restrained in the use of property. Certainly, the first amendment does not protect against every limitation on self-expression. See Note, *Aesthetic Regulation and the First Amendment*, 3 VA. J. NAT. RESOURCES L. 237 (1984); Pearlman, *Zoning and the First Amendment*, 16 URB. LAW. 217 (1984); Mandelker, *The Free Speech Revolution in Land Use Control*, 60 CHI.-KENT L. REV. 51 (1984); Williams, *supra* note 76.

When a prima facie case of nuisance is established, courts traditionally reject defenses based on constitutional rights of self-expression. As Professor Ellickson has concluded:

This disdain for freedom of expression defenses in nuisance cases is doubtlessly attributable to the easy availability of other means of expression to landowners. Restrictions on land use activities do not curtail individual liberties as sharply as restrictions on hairstyles, for example, because the unneighborly activity can be carried out in a more isolated location. For similar reasons the Supreme Court has tolerated imposition of reasonable restrictions on the time and place of even political expression. Although it will rarely be recognized in land use cases, the defense of freedom of expression serves as a useful reminder that maximization of wealth and the assurance of its fair distribution are not the sole social goals.

Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 750 (1973).

Since there is no direct regulation by the state, the constitutional issues can be raised only pursuant to a *Shelly v. Kraemer*, 344 U.S. 1 (1948), line of analysis. It is sufficient to point out that, within the context of private nuisance actions, such analysis is far from promising.

132. The fear that expression of community values would necessarily lead to a majoritarian conformity is unfounded. Many communities in our pluralistic society value diversity and actively encourage the same. The monotony so feared is more likely translated into the demand for clean streets and minimally repaired structures.



denies individuals a valuable tool for maintaining the integrity and preferred identity of their neighborhood. Arguably, greater social benefits accrue from allowing a community to retain its exclusively neo-Tudor style than from denying the community relief from a visually dissonant architectural style. A design that offends widely shared aesthetic values may depress property values<sup>133</sup> as well as cause neighbors to suffer as "captive viewers." The neighbor may be able to avoid the "eyesore" only by moving his or her residence. Such a move could entail considerable monetary and psychological costs. Quite simply, the right of individuals to the free use and enjoyment of their property must be reconciled with the competing interests of their neighbors and community. By making the sensibilities of the average person of the community the standard against which aesthetic interferences are judged, maximization of individual creativity and expression is maintained.

### III. AESTHETICS AND THE APPLICATION OF TRADITIONAL NUISANCE PRINCIPLES

From very early times, the law concerned itself with those annoyances characteristic of communal living<sup>134</sup> and, as a consequence, developed the doctrine of nuisance to place reasonable restrictions upon landowners' use of their property.<sup>135</sup> While the courts have traditionally refused to allow nuisance actions based upon aesthetic considerations, they have consistently granted redress for interferences with an individual's senses of hearing and smell.<sup>136</sup> Historically, courts have been especially protective of the nose and ear, awarding monetary damages and granting injunctions when noises or odors unreasonably burdened neighboring landowners. Yet, it seems somewhat incongruous to allow individuals redress for offenses to their senses of hearing and smell, but at the same time deny them a remedy for offenses

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133. The connection between property values and aesthetics is far from clear. Two articles which discuss the interrelationship are: Turnbull, *Aesthetic Zoning*, 7 WAKE FOREST L. REV. 230, 245 (1971) and Williams, *supra* note 76, at 19-20.

134. George Spater has summarized the area of ancient noises as follows:

Long before the beginning of modern science, men were making sounds that were disagreeable to their neighbors. Many of these were the natural noises of people and their domestic animals but a surprisingly large number were the noises of industry. One of the adventures of Don Quixote and Sancho Panza begins with the "terrible din" of a fulling mill. The fourteenth century Sir Gawain and The Green Knight speaks of the "wondrous loud noise" of a grind stone. The streets of the medieval town resounded with the "beating out of iron upon a blacksmith's anvil, hammering of carpenters, pounding on sheet copper from a kettle maker's." A poem written about 1350 complains that blacksmiths "Drive me to death with the din of their dints"; because of them "No man. . . can get a night's rest." And four hundred years later in what we think of as the peaceful colonial city of Philadelphia, Ben Franklin felt compelled to move from High Street to Second and Sassafras because "the din of the Market increases upon me; and that, with frequent interruptions, has, I find, made me say some things twice over."

Spater, *Noise and the Law*, 63 MICH. L. REV. 1373, 1373 (1965).

135. The term "nuisance" is derived from the French word "nuire," meaning to injure, hurt, or harm. Property law has traditionally recognized the maxim *sic utere tuo ut alienum non laedus* and has therefore required that owners use their property in such a manner so as to avoid injury to others. See 58 AM. JUR. 2d *Nuisances* §§ 20-23 (1971); W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 87 (5th ed. 1984). See also McRae, Jr., *The Development of Nuisances in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948).

136. In *Mathewson v. Primeau*, 64 Wash. 2d 929, 395 P.2d 183 (1964), the court refused to require the defendant to remove certain junk from his land, stating that the law of nuisance was not concerned with aesthetics. Significantly, however, the court enjoined the defendant's hog farm because the odors therefrom reached the plaintiff's property. See also *People v. Rubinfeld*, 254 N.Y. 245, 172 N.E. 485 (1930); *Duncan v. City of Tuscaloosa*, 257 Ala. 574, 60 So. 2d 438 (1952); *Gorman v. Sabo*, 210 Md. 155, 122 A.2d 475 (1956); *Alster v. Allen*, 141 Kan. 661, 42 P.2d 969 (1935).

to their sense of sight. While several bases for such differential treatment have been forwarded,<sup>137</sup> none are convincing. Indeed, sound reason dictates that visual sensibilities be afforded equal protection.<sup>138</sup> If the basis of nuisance is unreasonable interference with the use and enjoyment of land, then no sound rationale exists for treating visual annoyances differently from other interferences.<sup>139</sup> The effect of the interference is often the same<sup>140</sup> and identical criteria can be employed by the courts in order to minimize subjectivity.<sup>141</sup> In short, visual perception is not materially different from either smell or hearing.

It should be noted at the outset that there is no physiological reason for treating visual perceptions any differently from noise or smell. Physiologically, an individual's sensory systems function alike. The different sensory receptors collect energy, transfer it into nerve impulses, and finally transmit these impulses to nerve centers in the brain.<sup>142</sup> The ear, nose, and eye all act as receptor organs, transforming the energy received into electrochemical energy.<sup>143</sup> Neurons in the individual's nervous system respond to such energies and transmit impulses to the brain.<sup>144</sup> Here, the impulses are sorted and categorized and the particular sight, sound, or smell identified.<sup>145</sup> The physiological processes involved in all three sensory networks are, in essence, identical. Clearly, no physical or biological distinctions exist upon which to base the legal distinctions which have arisen. As one commentator has observed:

All sensory systems have the same physiological basis: they function as transducers which transfer energy of various forms, e.g., light, vibration and molecular structure, into nerve impulses which are transmitted to nerve centers such as the brain. The physiological and psychological responses and feelings generated by various types of stimuli may differ somewhat, but they are not distinguishable by any criteria that would suggest that visual stimuli have a less direct effect on human feelings and responses or that visual perception is so much more complex than that resulting from the other senses that it should be treated with more caution in legal analysis. In short, visual perception is not materially different from other types, and for purposes of legal actions, there is no physiological or psychological basis for distinguishing it from other types.<sup>146</sup>

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137. Some of the alleged distinctions to which commentators have pointed are (i) the more direct effects upon health caused by noise and odor and (ii) the alleged accurate and scientific measurability of sound and odor interference. See Broughton, *supra* note 25, at 463; Leighty, *supra* note 130; Costonis, *supra* note 10.

138. See Noel, *supra* note 8; Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075 (1970); Comment, *Injunction Against "Sight" Nuisance*, 2 U. PITT. L. REV. 191 (1936); Dukeminier, Jr., *supra* note 25; Note, *supra* note 70.

Churchill v. Rafferty is one of the earlier cases dealing with approval of aesthetic regulations. 32 Phil. 580 (1915), *cert. denied*, 248 U.S. 591 (1918). In validating an ordinance that authorized the removal of billboards that were offensive to the sight, the court stated that "we think it quite demonstrable that sight is as valuable to a human being as any of his other senses, and that the proper ministration to this sense conduces as much to his contentment as the care bestowed upon the senses of hearing or smell, and probably as much as both together." 32 Phil. 580, 608 (1915).

139. See *infra* notes 151-64 and accompanying text.

140. See *infra* notes 157-64 and accompanying text.

141. See *infra* notes 167-76 and accompanying text.

142. See L. WOODBURN, *THE NEURAL BASIS OF BEHAVIOR* (1967); J. DEUTSCH & D. DEUTSCH, *PHYSIOLOGICAL PSYCHOLOGY* (1966); C. BUTLER, *NEUROPSYCHOLOGY: THE STUDY OF BRAIN AND BEHAVIOR* (R. Russell ed. 1966).

143. L. WOODBURN, *supra* note 142, at 66-70.

144. J. DEUTSCH & D. DEUTSCH, *supra* note 142, at 378.

145. *Id.* at 378.

146. Comment, *Nuisance as a Modern Mode of Land Use Control*, 46 WASH. L. REV. 47, 64 (1970).

Given that there is no physiological basis for distinguishing visual sensibilities from noise or odor perception, courts must look elsewhere for rationale upon which to base their reluctance to recognize aesthetics as a basis for nuisance actions. As was discussed above,<sup>147</sup> courts, when faced with claims of aesthetic nuisance, point to the purported insubstantiality of the interference and the alleged subjectivity of any aesthetic standard. Yet, both characterizations are suspect. First, visual dissonance can create substantial interference with an individual's use and enjoyment of property.<sup>148</sup> Aesthetics constitutes an integral part of the individual's sociocultural identity. Aesthetic dysfunctions can, therefore, directly affect the individual's physical, social, and psychological well-being as much as, or even more than, other sensory intrusions. Secondly, by basing aesthetic nuisance actions upon the sensibilities of the average individual in the community, a workable, objective standard is available to the courts.<sup>149</sup> Such a standard mirrors the reasonable person standard employed by the courts when considering noise and odor intrusions.<sup>150</sup> From a practical standpoint, identical considerations are involved when determining whether a sight, noise, or odor disturbs the comfort of the ordinary individual. Thus, the distinctions between vision and the other senses drawn by the courts in this area simply lack substance.

#### A. Significance of the Invasion

Courts have had little problem in finding that various noises or odors constitute unreasonable interferences with an individual's use and enjoyment of land. While there is no fixed standard as to what degree of noise or odor constitutes a nuisance,<sup>151</sup> there is clear judicial recognition of the potentially substantial nature of such invasions.<sup>152</sup> Courts characteristically view offensive smells and loud noises as significant disturbances to the comfort and enjoyment of private property, rather than as mere petty annoyances. Although many noises or odors may constitute no more than trivial inconveniences, no court has declared that such sensory annoyances are *a priori* frivolous. Where a noise or odor produces discomfort to a neighboring

147. See *supra* notes 26-43 and accompanying text.

148. See *infra* notes 151-54 and accompanying text.

149. See *infra* notes 167-76 and accompanying text.

150. See *Gray v. City of High Point*, 203 N.C. 756, 166 S.E. 911 (1932).

151. The Supreme Court of Pennsylvania has held:

Where a noisy nuisance is complained of[,] it is a question of degree and locality. If the noise is only slight, and the inconvenience merely fanciful, or such as would only be complained of by people of elegant and dainty modes of living, and inflicts no serious or substantial discomfort, a court of equity will not take cognizance of it . . . . [But] if unusual and disturbing noises are made, and particularly if they are regularly and persistently made, and if they are of a character to affect the comfort of a man's household, or the peace and health of his family, and to destroy the comfortable enjoyment of his home, a court of equity will prevent [their] continuance.

*Kestner v. Homeopathic Medical & Surgical Hosp.*, 245 Pa. 326, 332, 91 A. 659, 661 (1914). See also *City of Pana v. Central Washed Coal Co.*, 260 Ill. 111, 102 N.E. 992 (1913); *Kentucky & W. Va. Power Co. v. Anderson*, 288 Ky. 501, 156 S.W.2d 857 (1941); *Stodder v. Rosen Talking Mach. Co.*, 241 Mass. 245, 135 N.E. 251 (1922); *Gorman v. Sabo*, 210 Md. 155, 122 A.2d 475 (1956).

152. See *Baltimore & P.R. Co. v. Fifth Baptist Church*, 137 U.S. 568 (1891); *Judson v. Los Angeles Suburban Gas Co.*, 157 Cal. 168, 106 P. 581 (1910); *Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976); *Sarraillon v. Stevenson*, 153 Neb. 182, 43 N.W.2d 509 (1950); *Redd v. Edna Cotton Mills*, 136 N.C. 342, 48 S.E. 761 (1904); *Krocker v. Westmoreland Planning Mill Co.*, 274 Pa. 143, 117 A. 669 (1922).

landowner, courts take an active interest in the extent of the interference.<sup>153</sup> Both the nature and extent of the noise or odor are closely examined,<sup>154</sup> rather than being summarily dismissed as has been the case with visual disturbances. Significantly, there appears to be no rationale for this inconsistent judicial treatment. Courts have failed to explain how noises or odors have any more substantial effect on the use and enjoyment of land than does aesthetics. Indeed, unsightly structures can despoil an individual's visual environment and thereby severely limit that individual's use and enjoyment of his or her property. Disturbances are no more "merely ugly" than "merely noisy"; no more "simply displeasing to the eye" than "simply foul."

Some commentators<sup>155</sup> have suggested that noises and odors have historically provided a basis for nuisance actions because of their potential for causing direct physical harm. Actual physical illness can result from noise or smells,<sup>156</sup> and therefore, it is argued, the law needs to be especially protective. Under this theory, offensive sights warrant less legal scrutiny since they normally do not cause the viewer to become physically ill. However, even assuming that the potential for physical harm can sometimes distinguish noise and odor invasions,<sup>157</sup> nuisance theory is not founded on physical injury. The issue considered under nuisance law is whether an individual has unreasonably interfered with the use and enjoyment of another individual's land. Such interference can, and often does, occur without the landowner being physically harmed thereby.<sup>158</sup> Clearly, something may constitute a nuisance even though it does not affect the health of the occupants of adjoining houses.<sup>159</sup> More specifically, courts simply do not require that a smell or noise be physically harmful; it is sufficient if the sensory invasion produces an impairment of the comfortable enjoyment of property.<sup>160</sup> As one state supreme court said: "A smell that is simply disagreeable to ordinary persons, is such [a] physical annoyance as makes the use of property producing it a nuisance, whether it be hurtful in its effects or not."<sup>161</sup>

153. The following statement by the Indiana Supreme Court illustrates the typical judicial doctrine:

Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and, when continued or repeated, make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property, as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress.

*Radican v. Buckley*, 138 Ind. 582, 586, 38 N.E. 53, 54 (1894).

154. See *Stodder v. Rosen Talking Mach. Co.*, 241 Mass. 245, 135 N.E. 251 (1922); *Borsvold v. United Dairies*, 347 Mich. 672, 81 N.W.2d 378 (1957); *Edmunds v. Duff*, 280 Pa. 355, 124 A. 489 (1924); *Clinic & Hospital v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (1951).

155. See *Broughton*, *supra* note 25, at 463; *Costonis*, *supra* note 10, at 398-99.

156. See *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934); *Froelicher v. Oswald Ironworks*, 111 La. 705, 35 So. 821 (1903); *Smith v. Western Wayne County Conservation Ass'n*, 380 Mich. 526, 158 N.W.2d 463 (1968); *Redd v. Edna Cotton Mills*, 136 N.C. 342, 48 S.E. 761 (1903); *Sherrod v. Dutton*, 635 S.W.2d 117 (Tenn. App. 1982).

157. See *supra* notes 155-56 and accompanying text.

158. See *Judson v. Los Angeles Suburban Gas Co.*, 157 Cal. 168, 106 P. 581 (1910); *Hart v. Wagner*, 184 Md. 40, 40 A.2d 47 (1944); *Alfred Jacobshagen Co. v. Dockery*, 243 Miss. 511, 139 So. 2d 632 (1962); *Harris v. City of Findlay*, 59 Ohio App. 375, 18 N.E.2d 413 (1938); *Neal v. Darby*, 282 S.C. 277, 318 S.E.2d 18 (1984); *Young v. Brown*, 212 S.C. 156, 46 S.E.2d 673 (1948); *Thornton v. Dow*, 60 Wash. 622, 111 P. 899 (1910).

159. See *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944); *Robie v. Lillis*, 112 N.H. 492, 299 A.2d 155 (1972); *Benton v. Kernan*, 130 N.J. Eq. 193, 21 A.2d 755 (1941); *Kramer v. Sweet*, 179 Or. 324, 169 P.2d 892 (1946); *Wade v. Fuller*, 12 Utah 2d 299, 365 P.2d 802. (1961); *Branch v. Western Petroleum Inc.*, 657 P.2d 267 (Utah 1982).

160. See *Baldwin v. McClendon*, 292 Ala. 43, 288 So. 2d 761 (1974); *Kembel v. Schlegel*, 329 Pa. Super. 159, 478 A.2d 11 (1984).

161. *Baldwin v. McClendon*, 292 Ala. 43, 48, 288 So. 2d 761, 765 (1974).

*Friendship Farms Camps, Inc. v. Parson*<sup>162</sup> is a case in point. Here two landowners sued for damages and injunctive relief alleging that the use of the neighboring land as a camp for marching bands constituted a nuisance. Evidence supported the contention that the band music and use of bullhorns interfered with the peaceful use and enjoyment of the plaintiff's property during the evening hours.<sup>163</sup> Alleging that no actual injury or sickness resulted from the noise, Friendship, the defendant, maintained that there was no basis for a nuisance action. The court found otherwise. In sustaining the trial court's holding that Friendship's use of the land constituted an enjoicable nuisance, the court emphasized:

Friendship's contention that actual physical sickness or illness must result before a nuisance may be found is without merit. This court has repeatedly stated that the essence of a private nuisance is the fact that one party is using his property to the detriment of the use and enjoyment of others. . . . While injury to health is a factor to be considered in determining if one's property is being detrimentally used, it is not the only factor to be considered . . . .<sup>164</sup>

Any analysis which attempts to explain the availability of nuisance theory for noise and odor interferences upon such interferences' potential to cause physical injury is incorrect. The focus of nuisance law is not upon physical injury but upon disturbance to one's use and enjoyment of land. Visual dissonance can have as substantial an effect upon an individual's use and enjoyment of property as either noise or odor. Nuisance law is primarily concerned with the degree of the interference itself rather than with the secondary physical effects the interference may cause.

#### B. "Ordinary Person" Standard

Perhaps the most significant criticism that has been leveled against aesthetic nuisances is the alleged impossibility of establishing a workable objective standard.<sup>165</sup> Earlier in this Article,<sup>166</sup> it was argued that this criticism is based upon a misconception. Once aesthetics is understood as being part and parcel of community values and identity rather than an evaluation of inherent beauty, the objective standard of the "normal individual" becomes readily available for application.<sup>167</sup> As a result, determining whether "unsightliness" unreasonably annoys the ordinary individual in the community becomes as straightforward and workable as determining whether a noise or odor produces an equally unreasonable effect. The courts will be no more obliged to become arbiters of taste when dealing with unaesthetic sights than they have been when dealing with disturbing noises or obnoxious odors. Certainly, such a standard has, for a very long time, proven workable for noise and odor.<sup>168</sup>

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162. 172 Ind. App. 73, 359 N.E.2d 280 (1977).

163. *Id.* at 76-77, 359 N.E.2d at 282.

164. *Id.* at 76, 359 N.E.2d at 282.

165. See *supra* note 35 and accompanying text.

166. See *supra* notes 75-78 and accompanying text.

167. See *supra* note 123 and accompanying text.

168. Such a standard was applied in 1905 where poultry odors and noises were held to be non-offensive to the ordinary individual of a small New England community. *Wade v. Miller*, 188 Mass. 6, 73 N.E. 849 (1905).

The "normal individual in the community" has provided the standard for non-visual nuisance actions.<sup>169</sup> If a normal person living in the community would regard the noise or odor as offensive, seriously annoying, or intolerable, then the invasion is deemed significant and therefore actionable.<sup>170</sup> Conversely, if normal persons in the neighborhood would not be substantially disturbed, then the interference is not significant and no action for nuisance would lie.<sup>171</sup> *Burgess v. Omahawks Radio Control Organization*<sup>172</sup> is illustrative. Several owners of property near an area leased to a radio-controlled model aircraft organization brought a nuisance action against the lessor and the organization seeking to enjoin the operation of the model planes. Although admitting that the noise caused by the planes did at least partially annoy the plaintiffs, the court ruled that the activity did "not rise to a level of private noise nuisance."<sup>173</sup> In reaching its decision, the court considered the extent of the noise, the nature of the community, and the effect of the noise on the "average" members of the community.<sup>174</sup> The court also reviewed the standard that it and most other courts employ in such circumstances:

Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary, reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and must be based upon an objective standard of reasonableness.<sup>175</sup>

While such a standard may in some situations be difficult to apply, it has proven to be highly workable. Both courts and juries have been able to successfully make gross assessments regarding the offensiveness of the noise or smell. Based on this assessment, they have had little difficulty in determining whether such noise or smell is sufficient to disturb the comfort of the normal individual in the locality. The standard is, after all, straightforward and the underlying policy considerations generally understood. To the factfinder, a simple, yet fundamental, beginning to the inquiry starts with the following question: What do ordinary people in the community have a right to reasonably demand from their neighbors in the use and enjoyment of their property?<sup>176</sup>

Such inquiry is equally applicable to aesthetic considerations.<sup>177</sup> If the visual

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169. See *Daugherty v. Ashton Feed & Grain Co.*, 208 Neb. 159, 303 N.W.2d 64 (1981).

170. See *Thornburg v. McMillin*, 392 So. 2d 1119 (La. App. 1980).

171. See *City of Spickardsville v. Terry*, 274 S.W.2d 21 (Mo. App. 1954).

172. 219 Neb. 100, 362 N.W.2d 27 (1985).

173. *Id.* at 104, 362 N.W.2d at 30.

174. *Id.*, 362 N.W.2d at 30.

175. *Id.* at 102, 362 N.W.2d at 29.

176. An early Massachusetts case offers a classic summarization of this inquiry:

The pertinent inquiry is whether the noise materially interferes with the physical comfort of existence, not according to exceptionally refined, uncommon, or luxurious habits of living, but according to the simple tastes and unaffected notions generally prevailing among plain people. The standard is what ordinary people, acting reasonably, have a right to demand in the way of health and comfort under all the circumstances.

*Stevens v. Rockport Granite Co.*, 216 Mass. 486, 489, 104 N.E. 371, 373 (1914).

177. One student commentator has noted:

It has been pointed out that the difficulties of setting an objective standard as to what degree of noise or odor is sufficient to substantially annoy the ordinary person are hardly greater than in the case of an eyesore. These difficulties have not kept courts from declaring offenses to the nose or ears to be nuisances.

Note, *supra* note 17, at 60.

intrusion would be seriously offensive to the normal individual in the community, the invasion would be significant and, consequently, an action in aesthetic nuisance would be available. *People v. Stover*<sup>178</sup> emphasized this nexus that exists among the visual, aural, and olfactory senses. Although *Stover* dealt with the validity of a city ordinance proscribing the maintenance of clotheslines in the front and side yards of a residential district,<sup>179</sup> the court's observations regarding the applicability of the "average person" standard to the field of visual perception are equally applicable to nuisance law. Significantly, the court adopted the "average person" standard as its guide for measuring visual offenses, distinguishing this standard from the "arbitrary and capricious standard of beauty."<sup>180</sup> By simply proscribing conduct that is "unnecessarily offensive to the visual sensibilities of the average person,"<sup>181</sup> the court concluded that the ordinance imposed a useful objective standard. Furthermore, the court reasoned that the legal protection afforded against offensive sounds and smells should be extended to offensive sights, particularly since the "average person" standard is as applicable to sight interferences as it is to hearing or smell intrusions.<sup>182</sup> The court noted that conduct which offended the sensibilities of hearing and smell had previously been deemed nuisances and that there was no rational difference between such activities and conduct unnecessarily offensive to the visual sensibilities of the average person. Just as a person of normal aural or olfactory sensibilities provides a useful standard, so too would the person of normal visual sensibilities.

While some of the conclusions of *Stover* have been criticized,<sup>183</sup> the parallels drawn in the case among the senses of hearing, smell, and vision highlight the specious reasoning used by other courts to separate visual perception for deferential treatment. The "relativity of the eye of the beholder" is no greater a problem than the "relativity of the nose/ear of the beholder." Subjective valuation is endemic to the decisionmaking process itself; it is as prevalent when dealing with noise and odor

178. 12 N.Y.2d 462, 191 N.E.2d 272 (1963).

179. *Id.* at 465, 191 N.E.2d at 273.

180. *Id.* at 468, 191 N.E.2d at 276.

181. In discussing the regulatory nature of the ordinance in question, the court stated:

The ordinance imposes no arbitrary or capricious standard of beauty or conformity upon the community. It simply proscribes conduct which is unnecessarily offensive to the visual sensibilities of the average person. It is settled that conduct which is similarly offensive to the senses of hearing and smell may be a valid subject of regulation under the police power . . . , and we perceive no basis for a different result merely because the sense of sight is involved.

*Id.* at 468, 191 N.E.2d at 276.

182. *Id.* at 469, 191 N.E.2d at 276.

183. *See id.* at 470-73, 141 N.E.2d at 277-79 (Van Voorhis, J., dissenting). One of the scholarly comments on *People v. Stover* highlights this criticism:

The court's standard—conduct that is unnecessarily offensive to the visual sensibilities of the average person—is only marginally useful at best and conflicts seriously with its own initial analysis of aesthetic considerations. The court supports this standard with the proposition that the legal protection afforded against offensive smells and sounds should be extended to offensive sights. Yet, in all but the most extreme instances, there is far less agreement regarding what is offensive to sight than what is offensive to smell and hearing. A man of average olfactory or aural sensibilities may be a useful standard since most men would agree that a given smell or sound is offensive. But the man of average visual sensibilities does not exist except in any but the most unusual instances.

Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81, 90 (1964).

as with sight. Visual interferences pose no special problems that would justify their different treatment. Objectivity resides in the "normal person with normal sensitivities," notwithstanding the fact that individual factfinders may never agree on the character of noise, type of odor, or style of architecture each finds personally offensive. Cassandra-like predictions of the unsuitability and inapplicability of such a standard to aesthetic nuisance notwithstanding, practical application of this standard in thousands of cases throughout the past two centuries attests to its workability. Such workability should prove no less true when applied to aesthetic nuisances.

### C. Locality

In determining whether an activity is so offensive to the senses as to constitute a nuisance, the locality within which the activity is conducted is of primary importance.<sup>184</sup> The noise or smell is not considered in isolation but in the context of the neighborhood in which it occurs. The courts use as their guide the normal individual *in the community*. As the Supreme Court of Pennsylvania noted when issuing a permanent injunction against the operation of a drag strip racing track in a primarily residential area: "every person has the right to require a degree of quietude which is consistent with the standard of comfort prevailing in the locality wherein he lives."<sup>185</sup> Whether the community is a peaceful residential town,<sup>186</sup> a bustling commercial center,<sup>187</sup> or an outlying agricultural area<sup>188</sup> can make a dramatic difference. While other considerations may also play a central role,<sup>189</sup> it is essential therefore to consider the character of the environment in which the noise or smell is located. Justice Sutherland's now famous quotation reinforces this connection: "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."<sup>190</sup>

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184. See *Baltimore & P.R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883); *First Ave. Coal & Lumber Co. v. Johnson*, 171 Ala. 470, 54 So. 598 (1911); *Higgins v. Decorah Produce Co.*, 214 Iowa 276, 242 N.W. 109 (1932); *Hofstetter v. George M. Myers, Inc.*, 170 Kan. 564, 228 P.2d 522 (1951); *Fox v. Ewers*, 195 Md. 650, 75 A.2d 357 (1950); *Meadowbrook Swimming Club, Inc. v. Albert*, 173 Md. 641, 197 A. 146 (1938); *Cahill v. Heckel*, 87 N.J. Super. 201, 208 A.2d 651 (1965); *Guarina v. Bogart*, 407 Pa. 307, 180 A.2d 557 (1962); *Sohns v. Jensen*, 11 Wis. 2d 449, 105 N.W.2d 818 (1960).

Comment (e) of the RESTATEMENT (SECOND) OF TORTS Section 821F (1979) reads:

The location, character and habits of the particular community are to be taken into account in determining what is offensive or annoying to a normal individual living in it. Thus the odors of a hen house, which would be highly objectionable in a residential area in a city, may be acceptable and normally regarded as harmless and inoffensive in a rural district.

185. *Bedminster Township v. Vargo Dragway, Inc.*, 434 Pa. 100, 105, 253 A.2d 659, 661 (1969).

186. See *Fox v. Ewers*, 195 Md. 650, 75 A.2d 357 (1950); *Smith v. Western Wayne County Conservation Ass'n*, 380 Mich. 526, 158 N.W.2d 463 (1968); *Norton Shores v. Carr*, 81 Mich. App. 715, 265 N.W.2d 802 (1978).

187. See *Morgan County Concrete Co. v. Tanner*, 374 So. 2d 1344 (Ala. 1979); *Beth Israel Congregation v. City of Jackson*, 210 So. 2d 676 (Miss. 1968); *Wejner v. Yale and Towne Mfg. Co.*, 348 Pa. 595, 36 A.2d 321 (1944); *Caldwell v. Knox Concrete Prods. Inc.*, 54 Tenn. App. 393, 391 S.W.2d 5 (1964).

188. See *Montgomery v. Bremer County Bd. of Supervisors*, 299 N.W.2d 687 (Iowa 1980); *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 313 N.W.2d 667 (1981); *Smilie v. Taft Stadium Bd. of Control*, 201 Okla. 303, 205 P.2d 301 (1949).

189. For example, the question of whether a particular use constitutes a nuisance is ordinarily one of fact which depends on all the surrounding circumstances. Among the circumstances which need be considered are the degree of the disturbance, the nature of the use, the magnitude of the use, the time of the disturbance, and the intensity of the interference. See 66 C.J.S. *Nuisances* § 22(b) (1950).

190. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). True to Justice Sutherland's example, numerous cases chronicle the effect locality has on the determination of whether pig farming constitutes a nuisance. See



When determining whether a particular noise constitutes a nuisance, courts focus on the consistency of the defendant's use with the general character of the area.<sup>191</sup> Normally, individuals may only insist on the degree of quietude consistent with that prevailing in their locality.<sup>192</sup> Thus, noise that amounts to a nuisance in one neighborhood may be perfectly acceptable in another.<sup>193</sup> An early Alabama case is illustrative.<sup>194</sup> The owner of a lot in a residential community sued the local power company. The owner alleged that the electrical substation which the company had erected near his house created noise "of such volume and character as to . . . materially interfere with the comfort, enjoyment and use of said property . . . ."<sup>195</sup> Commenting on whether or not the noise in question was sufficient to constitute a private nuisance, the court made the following statement:

The general rule as to effect of locality in determining what constitutes a nuisance applies in the case of noise. What may be a nuisance in one locality may not in another. Noises may be a nuisance in the country which would not be in a populous city. A person who resides in the center of a large city must not expect to be surrounded by the stillness which prevails in a rural district. He must necessarily bear some of the noise and occasionally feel slight vibrations produced by the movement and labor of its people and by the hum of its mechanical industries.<sup>196</sup>

Those who live in an industrial area must normally tolerate the noises which customarily emanate from such enterprises.<sup>197</sup> Conversely, noisy enterprises cannot with impunity invade the residential neighborhood.<sup>198</sup>

*Rose v. Chaikin*,<sup>199</sup> a more recent case dealing with the relative nature of noise interference, provides another demonstration of the effect that locality can have on

Cook v. Hatcher, 121 Cal. App. 398, 9 P.2d 231 (1932); Yeager & Sullivan, Inc. v. O'Neill, 163 Ind. App. 466, 324 N.E.2d 846 (1975); Bower v. Hog Builders, Inc., 461 S.W.2d 784 (Mo. 1974). Thus, in Cline v. Franklin Pork, Inc., 210 Neb. 238, 313 N.W.2d 667 (1981), the appellant hog farmers asserted that the odors were merely part of the atmosphere of a normal rural farming community and the court held that "the fact that the residence is in a rural area requires an expectation that it will be subject to normal rural considerations. . . ." *Id.* at 242, 313 N.W.2d at 670. Similarly, in Jewett v. Deerhorn Enters., Inc., 281 Or. 469, 575 P.2d 164 (1978), area residents successfully enjoined the operation of a pig farm located near a residential community. Noting that the plaintiff-residents owned their properties prior to the time the defendant began operating the pig farm, the Oregon court stated:

Indeed, the evident character of the neighborhood should have served as a warning to defendant of the risk they assumed in locating the pig farm in this area. A pig farm which may be operated in a rural area where the homes are widely separated without unreasonable interference with others' use of their property may become unreasonable when placed in a residential district.

*Id.* at 475, 575 P.2d at 167.

191. See Warren Co. v. Dickson, 185 Ga. 481, 195 S.E. 568 (1938); Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1933); Caldwell v. Knox Concrete Prods., Inc., 54 Tenn. App. 393, 391 S.W.2d 5 (1964).

192. See Collins v. Wayne Iron Works, 227 Pa. 326, 76 A. 24 (1910); Caldwell v. Knox Concrete Prods., Inc., 54 Tenn. App. 393, 391 S.W.2d 5 (1964).

193. See Federal Amusement Co. v. State, 159 Fla. 495, 32 So. 2d 1 (1947); Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914); Smith v. Western Wayne County Conservation Ass'n, 380 Mich. 526, 158 N.W.2d 463 (1968).

194. Alabama Power Co. v. Stringfellow, 228 Ala. 422, 153 So. 629 (1934).

195. *Id.* at 423, 153 So. at 630.

196. *Id.* at 425, 153 So. at 632.

197. See Morgan County Concrete Co. v. Tanner, 374 So. 2d 1344 (Ala. 1979); Monlezun v. Jahncke Dry-Docks, Inc., 163 La. 400, 111 So. 886 (1927); Lohmuller v. Kirk & Son. Co., 133 Md. 78, 104 A. 270 (1918); Gilbert v. Showerman, 23 Mich. 448 (1871).

198. See Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914); Jewett v. Deerhorn Enters., Inc., 281 Or. 469, 575 P.2d 164 (1978); Ebur v. Alloy Metal Wire Co., 304 Pa. 177, 155 A. 280 (1931).

199. 187 N.J. Super. 210, 453 A.2d 1378 (1982).

the reasonableness of the sensory intrusion. The court in *Rose* held that a windmill constituted a private nuisance where it produced a sound that was incongruous with the residential neighborhood within which it was located. When considering the offensive character of the noise generated, the court provided the following analysis:

Its intrusive quality is heightened because of the locality. The neighborhood is quiet and residential. It is well separated, not only from commercial sounds, but from the heavier residential traffic as well. Plaintiffs specifically chose the area because of these qualities and the proximity to the ocean. Sounds which are natural to this area—the sea, the shore birds, the ocean breeze—are soothing and welcome. The noise of the windmill, which would be unwelcome in most neighborhoods, is particularly alien here.<sup>200</sup>

Like noise and odor, aesthetic valuations are a direct reflection of the interaction between the individual and his or her environment.<sup>201</sup> An individual's aesthetic response to the visual environment is based upon the cognitive and emotional meanings which the visual pattern convey. "Unsightliness" is, to a great degree, a response to the incongruity that a particular visual pattern causes within a given visual environment. To the extent that the visual preception conforms to the expectations of the locality, either by reflecting the characteristic pattern of the community or by evidencing the sort of difference acceptable to or even encouraged by the community, unsightliness is diminished. Decrease the congruity between the visual form and the community's expectations and dissonance is thereby fostered.

This link between visual perception and neighborhood custom has long been recognized. In *Parkersburg Builders Material Co. v. Barrack*,<sup>202</sup> the Supreme Court of West Virginia hinted at the proprietary linkage existing between neighborhood character and visual interference:

An automobile junk yard is not necessarily an objectionable place. The business of buying old automobiles, wrecking them and selling serviceable parts as such and junking the residue is an honorable and useful business. But an outdoor lay-out of a business of that kind necessarily is not pleasing to the view. Such business, therefore, should not be located in a community of unquestioned residential character.<sup>203</sup>

Junkyards in residential areas, pyramidal houses within a long standing neo-Tudor community, rusting windmills abutting modern commercial districts: all pose potential aesthetic problems. While each object in itself may be aesthetically "neutral," it can become visually offensive if located within certain types of communities. Conversely, if properly placed, each use can satisfy community needs and meet community expectations. Junkyards may be fine in certain industrial districts; pyramidal houses prized in Miami's modern Brickell District; rusting windmills preserved as a part of Kansas' heritage. It can no longer be doubted that something visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes. Objects become "unsightly" primarily because of their dissonant "fit" within the sociocultural character of the neighborhood. Such

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200. *Id.* at 218, 453 A. 2d at 1382.

201. See *supra* notes 76-81 and accompanying text.

202. 118 W. Va. 608, 191 S.E. 368 (1937).

203. *Id.* at 613, 191 S.E. at 371.

is precisely the case with noises and odors. There is simply no basis upon which to distinguish visual perception or to separate it for differing treatment.

#### IV. CONCLUSION

It is time for the law of private nuisance to recognize actions based on aesthetics. Judicial hesitancy to base an action in nuisance upon aesthetic considerations is simply misguided. The traditional rationale for denying an action for aesthetic nuisance is the result of historical bias, faulty analysis, and illogic. While courts have historically discounted the effect of visual intrusions on the use and enjoyment of land, there is no longer any doubt that unsightly environs can severely and unreasonably affect an individual's physical, emotional, and psychological well-being. In addition, by weighing aesthetic considerations against the sensibilities of the "ordinary individual" within the community, an objective and highly workable standard for evaluating aesthetic intrusions is available to the courts. The law of private nuisance was developed to protect against unreasonable interferences with the use and enjoyment of land. Aesthetic considerations can produce precisely such interference. The law readily acknowledges nuisance actions based on noise and odor intrusions; there is simply no convincing argument for treating visual perception any differently. To the extent that earlier case law denies the application of nuisance doctrine to aesthetic considerations, such case law should be expressly overruled.

